Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THE CITY OF BURBANK,

Petitioner,

v.

IRV RUBIN AND ROBERTO ALEJANDRO GANDARA,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second District, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Burbank City Council has been enjoined from allowing "sectarian" prayers at any city council meeting, and has been ordered to advise individuals giving a legislative invocation at all meetings that "sectarian" prayers are not permitted. The following three questions are presented here:

1. Whether the allowance of a single or occasional "sectarian" prayer offered by citizen volunteers at a public meeting of a legislative body constitutes the "advancement" of a particular religious ideology by the legislative body, in violation of the Establishment Clause of the First Amendment to the United States Constitution and the Court's decision in *Marsh v. Chambers*, 463 U.S. 782 (1983)?

2. Does the legislative prayer practice dictated by the California courts – which now requires California legislative bodies to ascertain whether prayers in their meetings are "sectarian" and then ban such prayers under penalty of contempt – violate the Establishment Clause by impermissibly entangling government with religion?

3. Whether a legislative body, which is now required to determine whether a legislative prayer is "sectarian" and to prohibit any such "sectarian" prayer, engages in viewpoint discrimination in violation of the Free Speech Clause of the First Amendment to the United States Constitution and this Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)?

PARTIES TO THE PROCEEDINGS

The Petitioner is the City of Burbank, a municipal governmental entity, organized and existing under the laws of the State of California.

The Respondents are Irv Rubin[1] and Roberto Gandara, both individuals.

[1] Mr. Rubin recently died; however, the injunction remains in effect, as does the wide impact of the court of appeal's published opinion.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The City of Burbank respectfully petitions this Court for a writ of certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Two, to review the decision in *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194 (2002), which held that:

> A. The inclusion of a single or occasional "sectarian" prayer at a city council meeting was an "advancement" of a specific religion by the city council in violation of the Establishment Clause of the U.S. Constitution and the Supreme Court's holding in *Marsh*, *supra*;
>
> B. The city council be enjoined from "allowing" sectarian prayers at city council meetings, and ordered the council to advise persons giving such prayers at city council meetings that "sectarian" prayers are not permitted.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, is reported at 101 Cal. App. 4th 1194, 124 Cal. Rptr. 2d 867 (2000), and appears in Appendix A, at App. 1-20. The Court of Appeal's Order Modifying Opinion and Denying Rehearing appears in Appendix B, at App. 21-22. The opinion of the state trial court appears in Appendix C, at

App. 23-30. The California Supreme Court's *en banc* denial of Petition for Review appears in Appendix D, at App. 31.

STATEMENT OF JURISDICTION

The petitioner seeks review by writ of certiorari of the final judgment rendered on the merits by the California Court of Appeal, Second Appellate District, Division Two (Petition for Review denied by the California Supreme Court). The court of appeal's decision was filed on September 9, 2002. (*See* Appendix A.) The court of appeal's Order Modifying Opinion and Denying Rehearing was filed on October 7, 2002. (*See* Appendix B.) The California Supreme Court's denial of the City of Burbank's Petition for Review was filed on December 18, 2002. (*See* Appendix D.) Jurisdiction is conferred upon this Court pursuant to Title 28 U.S.C. § 1257(a).

RELEVANT STATUTES AND REGULATIONS

U.S. Constitution, Amendment I

28 U.S.C. § 1257(a)

STATEMENT OF THE CASE

A. Introduction

This case is about the California court of appeal's unilateral modification of *Marsh v. Chambers*, 463 U.S. 783 (1983), relating to legislative invocations. The California court of appeal's decision affirmed an injunction

banning the inclusion of *any* "sectarian" legislative prayer at the Burbank City Council meetings, and required the City of Burbank and all other legislative bodies in California to censor the content of the invocations on the basis of the viewpoint/ideology expressed therein.

The court of appeal determined that a single invocation which ended with the words "in the name of Jesus Christ," was impermissibly "sectarian" and thus violated the Establishment Clause and this Court's decision in *Marsh*. Further, despite evidence that non-Christians regularly contributed prayers at the city council meetings and that a large number of the Christians offering prayers did not reference Jesus Christ, the court of appeal held that this single prayer conveyed a message that Christianity was being "advanced" by the Burbank City Council, and did not fall within the scope of the legislative prayer sanctioned by the Court in *Marsh*. As a result of this determination, the City of Burbank was enjoined from allowing anyone to give a "sectarian" prayer at city council meetings, and ordered to advise those who volunteered to give the prayer that "sectarian" prayer was not permitted. *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194, 1197 (2002). By extension, the published decision similarly affects all California legislative bodies.

Governmental agencies in California must now tread down a slippery constitutional slope by first examining the invocation to determine whether or not it is "sectarian" and then to prohibit any such "sectarian" prayers from being given at a public meeting. This examination is an unconstitutional entanglement with religion in violation of the Establishment Clause; and, the subsequent prohibition of any such "sectarian" prayers from being given is the most egregious form of content-based discrimination in

violation of the Free Speech Clause of the United States Constitution.

B. The Facts of the Case

The facts of the case are undisputed.[2] Respondent Irv Rubin attended one of the Burbank City Council's weekly meetings at which he heard an invocation given by a local volunteer which ended with the words "in the name of Jesus Christ."[3] He and Roberto Gandara (who was not present at that meeting) filed a lawsuit challenging the legislative invocation as violative of the Establishment Clause.

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[2] *Rubin*, *supra*, at 1197.

[3] The full text of the invocation is the following:

> "Our Father in Heaven, we are grateful to assemble this evening in the capacity of the City Council meeting. We wish to thank thee and express our gratitude for the blessings that we receive each day. We especially are mindful of this week and the Thanksgiving Day to come on which people all over our nation will be expressing gratitude and love unto thee for thy bounteous blessings. [¶] We feel privileged to be a part of this community. We are grateful for those who have stepped forward and have been elected to lead this community. Will thou bless them and give them insight and wisdom and those of the city staff who assist and direct the affairs of the city. [¶] Heavenly Father we are grateful for the youth of this community for they are the future and we ask a blessing upon those who teach and lead the youth that they may inspire them to be their best. [¶] We are grateful heavenly Father for all that thou has poured out on us and we express our gratitude and our love in the name of Jesus Christ. Amen."

Rubin, *supra*, at 1198, fn.1.

Since 1953 the City of Burbank has begun each city council meeting with a religious invocation. The invocation is usually given by a member of the non-denominational Burbank Ministerial Association ("BMA"), a group of local clergy and representatives of all the organized religious groups in the City of Burbank. This group is not exclusively Christian. The BMA's long-standing practice has been to circulate among its members a sign-up sheet for volunteers to give the council invocation. The list would be provided to the Burbank City Clerk who would place the name of the volunteer on the agenda. Neither the city council nor the City Clerk had any input into who was to give the invocation and did not control the content or subject matter of the invocation. The BMA members determined among themselves that each would be allowed to individually choose how and in what manner to give the invocation and imposed no restrictions regarding the content of the prayers. *Rubin, supra,* at 1197-98.

The resulting practice was a weekly invocation that differed depending upon the volunteer. Although a majority of the members did not use Jesus Christ in their invocation, those whose training and beliefs compelled them to pray in the name of Jesus Christ did so.[4] *Rubin, supra*, at 1198.

Rubin and Gandara sought injunctive relief in the California state court to prevent the City of Burbank from condoning, allowing and sponsoring all "religious prayers"

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[4] It was undisputed that only twenty per cent of the volunteers giving the legislative invocation mentioned Jesus Christ. The remainder gave more generic prayers. *Rubin, supra*, at 1204.

at the city council meetings. They sought a declaratory judgment that Burbank's practice and custom in allowing the prayers described in the complaint violates the Establishment Clause.

C. The Courts Below

After a bench trial, the trial court ruled in Respondents' favor, finding that "the status of the law today is that non-sectarian prayer is permitted but sectarian prayer is not." (Appendix C, App. 27.) Declaring the single prayer Mr. Robin heard at the Nov. 23, 1999 Burbank City Council meeting to be "sectarian", the trial court found an Establishment Clause violation and enjoined "the inclusion of sectarian prayer in City Council meetings." (Appendix C, App. 27.) The trial court directed the Burbank City Council to "advise" participants that "sectarian prayer as a part of City Council meetings is not permitted under our Constitution." (Appendix C, App. 28.)

An intermediate California appeals court affirmed the judgment of the trial court in a published decision. The California Supreme Court denied the City of Burbank's Petition for Review.

The court of appeal committed two fundamental Constitutional errors in reaching its holding, as further described here:

1. First Constitutional Error: The court of appeal affirmed the trial court's extension of *Marsh* to incorporate a "sectarian" standard or element in its analysis of the individual prayer and the City of Burbank's legislative prayer practice. The court of appeal held that a citizen volunteer's single reference to Jesus Christ in the invocation

conveyed the message that Christianity was being advanced by the City Council over other religions, thus violating the Establishment Clause. *Rubin, supra*, at 1203-04.

The reasoning of the court of appeal followed this path: The *Marsh* decision was "factually predicated" upon invocations from which all references to Jesus Christ had been removed (citing *Marsh,* 463 U.S. at 793, fn.14) – in other words, according to the court of appeal, they were "non-sectarian." *Rubin*, *supra*, at 1203. The court of appeal cited *County of Allegheny v. Greater Pittsburgh ACLU, et al.*, 492, U.S. 573 (1989), for the premise that government must not affiliate itself or officially prefer any one religious denomination over another. Relying on *Allegheny, supra,* the court of appeal thus held that irrespective of the City of Burbank's actual practices, a reference to Jesus Christ in the single prayer at issue conveyed the message that the Burbank City Council was a Christian body and was "advancing a [particular] religious belief." *Rubin, supra.* at 1204.[5] By allowing this single or even an occasional "sectarian" prayer, the city council was evincing its preference for Christianity. *Rubin*, *supra*, at 1205. Because of this apparent "affiliation" with the Christian faith, the Burbank City Council violated the dictates of *Marsh*, *supra*, and the Establishment Clause. *Rubin*, *supra*, at 1204-05. With this tautologically-flawed foundation, the

[5] "By directing the prayer to 'our Father in Heaven . . . in the name of Jesus Christ' the invocation conveyed the message that the Burbank City Council was a Christian body and from this it could be inferred that the council was advancing a religious belief." *Rubin*, *supra*, at 1204.

court of appeal affirmed the trial court's remedy to enjoin the allowance of "sectarian" prayers and order the volunteers to avoid relating any "sectarian" prayers. *Rubin*, *supra*, at 1207.

The court of appeal's reasoning is legally and logically unsound. It has significantly misconstrued *Marsh*. *Marsh* does not use, define, differentiate or in any manner incorporate the term "sectarian" into its analysis. By exhorting courts not to evaluate the content of individual prayers unless the prayer *opportunity* is exploited to advance or disparage one faith over another, *Marsh* intended to steer clear of the very sort of rigid and mechanical analysis which the court of appeal used in this case. Yet all California legislative bodies now must undertake such an analysis.

The court of appeal's reliance on *Allegheny*, *supra* (which addressed religious displays), as support for its conclusion that *any sectarian prayer* was violative of the Establishment Clause, *Rubin*, *supra*, at 1202, is misplaced. In *Allegheny*, the focus of the majority's holding was not on the fact that the creche was a "sectarian" religious expression, but rather that it was being displayed in a location that was otherwise not open to all on an equal basis. *Id.*, 492 U.S. at 589-600. This very same ostensibly "sectarian" expression, i.e., a creche, was held in *Lynch v. Donnelly*, 465 U.S. 668 (1984), not to violate the Establishment Clause because of the context of its display. The Court, in *Allegheny*, *supra*, distinguishes its holding from that in *Lynch*, *supra*, on the basis of the *context* of the activity (religious displays on public property). *Id.*, 401 U.S. at 595. In *Lynch*, *supra*, the Court employed a "reality" test, i.e., whether "in reality" the invocation establishes or tends to establish or advance a religious faith. "Rather

than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith – as an absolutist approach would dictate – the Court has scrutinized . . . official conduct to determine, whether, *in reality,* it establishes a religion or religious faith, or tends to do so. *See Walz* [*v. Tax Commission*, 397 U.S. 664, 669 (1970).]" *Lynch*, 465 U.S. at 677-78. Conduct or activities that "merely happens to coincide or harmonize with the tenets of some . . . religions" or which has "indirect," "remote," or "incidental" benefit upon religion," does not violate the Establishment Clause. *Lynch,* 465 U.S. at 682-83 (quoting *McGowan v. Maryland,* 366 U.S. 420, 442 (1961)).

The California court of appeal's reliance on *Allegheny* is yet another misinterpretation of this Court's Establishment Clause holdings and is simply wrong. "We expressly distinguished that site [in *Allegheny*] from the kind of public forum at issue here, and made clear that if the staircase were available to all on the same terms" it would not violate the Establishment Clause. *Capitol Square v. Pinette*, 515 U.S. 753, 765 (1995).

2. *Second Constitutional Error*: The court of appeal affirmed the trial court's order to the city council to engage in the scrutiny and censorship of legislative prayers on the basis of the viewpoint or ideology expressed in order to *protect against* Establishment Clause violations. *Rubin, supra*, at 1205.

In affirming the content-based censorship requirement of the trial court's decision, the court of appeal here mistakenly relied on distinguishable school prayer decisions, including *Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290 (2000), and *Cole v. Oroville Union High*

School Dist. 228 F.3d 1092 (9th Cir. 2000). *Rubin, supra*, at 1206. The court of appeal reasoned that an observer would likely perceive the invocation as carrying the City's "seal of approval" and thus, content-based restrictions imposed by the government would be constitutional. *Rubin, supra*, at 1206.

This Court has specifically noted that school prayer cases are fundamentally different from legislative prayer cases, and hence are not analogous here. "Inherent differences between the public school system and a session of a State legislature distinguish this case from *Marsh v. Chambers*. . . . The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend [graduation ceremonies]. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*." *Lee v. Weisman*, 505 U.S. 577, 597 (1992).

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for the following three reasons:

(1) The court of appeal established a new and different standard for reviewing the constitutionality of legislative invocations by adding the element of "sectarian" to the decision established by the Court in *Marsh*. This new standard, which is applicable to all public entities throughout the State of California who have or may desire to have legislative invocations, significantly misinterprets

and modifies *Marsh,* which has remained a steady constant in Establishment Clause jurisprudence. The court of appeal focused on an individual prayer, and not the City of Burbank's overall legislative invocation policies and practice, explicitly ignoring *Marsh*'s unequivocal instruction *not* to parse the content of an individual prayer where "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh, supra,* 463 U.S. at 795-796.

(2) This Court's precedents have been displaced by the remedy imposed by the court of appeal compelling California public entities to engage in a form of viewpoint or ideology censorship of the content of the speakers' legislative invocations. This Court has explicitly rejected as an "*egregious* form of content discrimination" a practice in which an otherwise permissible form of speech (legislative prayer) is restricted on the basis of the speaker's motivating ideology. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983); *see also, Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). Yet, legislative bodies in California now must censor prayers and prohibit individuals from participating who – either by religious compulsion or simple choice – invoke a reference to a specific religious figure.

(3) In order to comply with the court of appeal's orders enjoining "sectarian" prayer from city council and other meetings of legislative bodies

in California, these public entities must necessarily engage in an inquiry into the significance of the words and practices of religious speech in order to make a determination as to what is or is not "sectarian." These inquiries unconstitutionally entangle government with religion. *Widmar v. Vincent*, 454 U.S. 263 (1981).

I. A SINGLE OR OCCASIONAL "SECTARIAN" PRAYER OFFERED BY A CITIZEN VOLUNTEER AT A PUBLIC MEETING OF A LEGISLATIVE BODY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE; WHETHER THE PRAYER IS "SECTARIAN" OR "NON-SECTARIAN" IS NOT AN ELEMENT OF THE *MARSH* HOLDING.

A. Subject Matter Dictates The Divergent Approaches to Analyzing Establishment Clause Cases

Establishment Clause jurisprudence consists of a subtle and nuanced body of law evidencing bold distinctions between prayer, which opens a legislative session or court proceeding, and the confluence of religion and government under other circumstances. The opening of public legislative sessions with prayer is "deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Marsh*, *supra*, 463 U.S. at 786. In contrast are the many, varied decisions that address the Establishment Clause in other situations. These decisions are extremely varied and dependent on their subject matter. For instance, religious displays on public property are governed by one set of standards. *Lynch, supra*, *Allegheny, supra*. Government

aid to religion or religiously sponsored institutions yields other nuances. *Mitchell v. Helms*, 530 U.S. 793 (2000). The use of public facilities by religious groups carries with it other types of elements, including Free Speech inquiries. *Good News Club*, *supra*. School prayer cases, like the others mentioned above, have yielded yet another unique analytical system. *Santa Fe Independent School District*, *supra*.

Until the decision from the California court of appeal here, legislative prayers followed the clear dictates of *Marsh*, which has not been overruled, disapproved, or modified by this Court in *any manner*. In *Marsh*, the Court instructed that, "the content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. *This being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.*" *Marsh*, *supra*, 463 U.S. at 795-96, emphasis added.

The Court did not scrutinize the content of individual invocations in *Marsh*, did not differentiate between "sectarian" or "non-sectarian," and it did not "factually predicate" its decision on the content of the invocation, as the court of appeal mistakenly states. *Rubin, supra*, at 1203. The fact that specific references to Jesus Christ had recently been removed and replaced with a "Judeo-Christian" invocation was simply noted in footnote 14 in *Marsh*. However, a predominantly Judeo-Christian prayer tradition would not necessarily seem "non-sectarian" to practitioners of Shinto, Islam, Buddhism, Hinduism, or other non-Judeo-Christian religions. Further, it belies logic to suggest that the *Marsh* court would bother with its "instruction" to "courts" not to concern themselves with

parsing or sensitively evaluating the content of a particular prayer, if in fact their decision was "factually predicated" on the specific "Judeo-Christian" content of the legislative prayers at issue in that case.

As set forth above, the court of appeal relies heavily on the *Allegheny, supra,* decision. There is, however, no legal standard in *Allegheny* applicable to or appropriate for analyzing legislative prayer issues. Much of the discussion in *Allegheny* focused on the three-pronged test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Marsh* specifically avoided the *Lemon* test, which has been repeatedly criticized by members of the Court.[6]

Before *Marsh*, the Court applied the *Lemon* test to every Establishment Clause case decided between 1971 and 1984. *See Wallace v. Jaffree,* 472 U.S. 38, 63 (1985) (Powell, J., concurring). But the Court rejected the *Lemon*

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[6] Chief Justice Rehnquist has said that he sees "little use" in the *Lemon* test, a test that in his view "has no basis in the history of the Amendment it seeks to interpret, is difficult to apply and yields unprincipled results. . . . " *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Rehnquist, C.J., dissenting). Justice O'Connor has repeatedly indicated a preference for the endorsement test, noting the "difficulties inherent in the Court's use of the test articulated in *Lemon*." *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 347-48 (1987) (O'Connor, J., concurring). Justice Kennedy notes that the Supreme Court's decisions "often question [the *Lemon* test's] utility in providing concrete answers to Establishment Clause questions," adding that "substantial revision" of the test "may be in order." *Allegheny, supra*, 492 U.S. at 655-56 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy has further said that he "does not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area." *Id.* Justices Scalia and Thomas have likewise negatively viewed *Lemon*. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., joined by Thomas, J., concurring).

analysis for legislative prayer in its *Marsh* decision, focusing instead on the "deeply embedded" traditions of this country and the Founding Fathers' own acts in providing for paid legislative chaplains at the same time as they were drafting and approving the Establishment Clause. *Marsh*, *supra*, 463 U.S. at 786, 788. Indeed, the Sixth Circuit refers to *Marsh* as one of three Establishment Clause "tests"; the *Lemon* test and the "endorsement" test are the other two.[7] Because *Marsh* is the only case which addresses legislative prayer and because *Marsh* carved out such a unique analytical structure relative to the other lines of Establishment Clause jurisprudence, it should not be for a California state court to alter that analysis by injecting a factor (i.e., "sectarian") that the Court did not incorporate into its own analysis.

Finally, an important element of the *Allegheny* majority's analysis was a differentiation between the secular and religious characterizations of the displays themselves. This does not work for prayer. Prayer is by its nature religious. Legislative prayer is an accepted form of ceremonial deism. "[L]egislative prayer (like the invocation that commences each session of this Court) is a form of acknowledgment of religion that 'serve[s] in the only wa[y] reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. [Citations.] The function and history of this form of ceremonial deism suggest that 'those practices are not understood as conveying government

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[7] *ACLU v. Capitol Square*, 243 F.3d 289, 306 (6th Cir. 2001).

approval of particular religious beliefs.'" *Allegheny, supra,* 492 U.S. at 595, fn.46, citing Justice Brennan's dissent in *Lynch, supra,* 465 U.S. at 693, 717. Further, the purpose of legislative invocations is, as Justice O'Connor states in her concurring opinion in *Mitchell v. Helms,* 530 U.S. 793, 856 (2000), "[for] government officials [to] invoke spiritual inspiration entirely for their own benefit *without directing any religious message at the citizens they lead.*" (Emphasis added.)

Whereas in religious display cases the focus is on the secular or religious characterization of the particular display and the context of the forum in which it is displayed, the Courts' focus in the school prayer cases has been the forum in which the prayer is given regardless of whether or not it is sectarian. In *Lee, supra*, where a nonsectarian prayer prepared by school officials was to be given by a rabbi at a middle school graduation, the Court took great care to emphasize that *whether or not* the prayer was sectarian was not the distinguishing factor in its analysis. The distinguishing factor was the atmosphere in which the prayer was given, i.e., a school graduation ceremony where there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. [citations.] . . . [P]rayer exercises in public schools carry a particular risk of indirect coercion." *Lee, supra*, 505 U.S. at 592.

In the legislative prayer context, courts should concentrate on whether the "prayer opportunity" has been "exploited to proselytize or advance any one, or to disparage any other, faith or belief. . . . " *Marsh, supra*, at 795-96. Fixating on the content of one single prayer – as the court of appeal did here – is not an appropriate method to

determine an Establishment Clause violation. The applicable standard for evaluating potential Establishment Clause violations does not include analyzing whether the prayer is "sectarian."

B. The *Marsh* Court Does *Not* Direct Courts to Look at Whether an Individual Prayer Is "Sectarian" or "Non-Sectarian."

As indicated above, courts have followed very different analytical paths in deciding other types of Establishment Clause cases (e.g., school prayer, religious displays, aid to religion, etc.). In spite of the analytical twists and turns taken in these other types of Establishment Clause cases, *Marsh* has remained undisturbed. Further, the issue of the content of legislative prayer has not found its way back to this Court in any form.

Marsh does *not* direct any court to consider whether the content of an individual prayer renders it "sectarian" or not. *Marsh* does not suggest finding an Establishment Clause violation if the prayer is in fact "sectarian," let alone direct the issuance of an injunction against such prayer. California public agencies should not be controlled by an interpretation which is at odds with the law governing legislative invocations in the other forty-nine states.

II. REGULATING THE CONTENT OF LEGISLATIVE PRAYER ON THE BASIS OF THE IDEOLOGY EXPRESSED THEREIN IS CONSTITUTIONALLY IMPERMISSIBLE VIEWPOINT DISCRIMINATION.

Equally disturbing is the remedy fashioned by the trial court and approved by the court of appeal requiring

public entities to censor the content of the invocation on the basis of the ideology expressed therein. By restricting those whose traditions and beliefs about prayer require them to pray in the name of Jesus Christ or another deity, while allowing all others to pray in a manner that is consistent with their beliefs, public entities are forced to discriminate on the basis of the *speaker's* viewpoint or ideology. That is a violation of the Free Speech Clause. Further, this Court has held that "[v]iewpoint discrimination is . . . an *egregious* form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. See *Perry Ed. Assn.*, 460 U.S. at 46." *Rosenberger, supra,* 515 U.S. at 829. (Emphasis added.)

The Court has reinforced this tenet in its recent line of decisions relating to the forum in which the speech is presented. In a limited public forum setting at which a government entity could legitimately exclude certain classes of speech, the entity cannot restrict speech which is otherwise permitted because of the viewpoint expressed. *See*, e.g., *Perry Ed. Assn.*, *supra*; *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Rosenberger, supra,* 515 U.S. at 845-46.

Where an invocation at the beginning of a legislative session is a lawful constitutional practice, it cannot be restricted by the legislative body on the basis of the viewpoint or ideology expressed within the invocation. "The State's power to restrict speech [even in a limited public forum] . . . is not without limits. The restriction must not discriminate against speech on the basis of viewpoint." *Good News Club, supra,* 533 U.S. at 106. So, the court of appeal's remedy cannot be applied here.

III. REQUIRING THE CITY COUNCIL TO DETERMINE WHETHER A LEGISLATIVE PRAYER IS SECTARIAN UNCONSTITUTIONALLY ENTANGLES THE GOVERNMENT IN RELIGIOUS MATTERS.

In order for the Burbank City Council to comply with the mandates of the court of appeal to prohibit "sectarian" prayer at the public meetings, the city council must first determine whether a prayer is "sectarian." In order to do that, the council must necessarily assess the religious theories and beliefs of the speaker. This Court has held that where the government engages in a review of speech to determine the underlying philosophical assumptions respecting a person's religious theories and beliefs, such a course of action not only would violate the Free Speech Clause, but also would be considered to "[foster] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger, supra,* 515 U.S. at 846. This impermissibly entangles the government in religion.

Further, as the Court noted in *Lee, supra,* the First Amendment's Religion Clauses, in addition to preventing governmental advancement of a particular faith, also protect against governmental interference with religion. "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference." *Id.*, 505 U.S. at 589.

The court of appeal's "remedy" to correct the ostensible Establishment Clause violation leads public agencies directly into an unconstitutional entanglement with religion. This entanglement violates *both* the Establishment Clause and Free Speech clause.

CONCLUSION

The issues presented in this Petition are worthy of this Court's attention. The instant case was prompted by Respondent Rubin's offense at hearing a Christian prayer at the beginning of an official government meeting. It has ended at this juncture with an even greater offense – the unprecedented censorship of the free speech rights of volunteers who proffer the invocation and the unconstitutional entanglement of the government in religious matters.

It is anathema to the First Amendment to prohibit the participation in the legislative invocation opportunity by those whose prayer traditions, beliefs, or choice prompt them to pray in the name of a specific religious figure, while all others who do not pray in that manner are permitted to participate. "'*We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship.*'" *Rosenberger*, *supra*, 515 U.S. at 846, concurring opinion, O'Connor, J., quoting from *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 714 (1994).

Government does not belong in the business of telling people how or what to say when they pray. Similarly, affording different individuals the opportunity to share their own individual prayers in a constitutionally-sanctioned forum

does not intrude on or threaten the requisite governmental neutrality toward religion. However, governmental censorship of this particular form of speech, such as that required by the court of appeal, *is* inconsistent with the Establishment and Free Speech Clauses, and requires exacting scrutiny by this Court. The millions of California citizens impacted by the court of appeal's decision deserve the uniformity enjoyed by the citizens of the other forty-nine states as provided in the unmodified, unexpanded *Marsh* decision of the Court. This Court and not the California Second District Court of Appeal should control the continuing vitality of *Marsh*.

For the above stated reasons, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Submitted this 17th day of March, 2003.

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APPENDIX A

Filed 9/9/02

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

IRV RUBIN et al., Plaintiffs and Respondents, v. CITY OF BURBANK, Defendant and Appellant.	B148288 (Los Angeles County Super. Ct. No. BC 221942)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alexander H. Williams III, Judge. Affirmed.

Dennis A. Barlow, City Attorney and Juli C. Scott, Chief Assistant City Attorney for Defendant and Appellant.

John L. Gordon, Stuart J. Roth, David A. Cortman, Gregory N. Bryl and American Center for Law and Justice for Mayor Margaret Clark, Zane Han, Gary Clark, Joe Velasquez and Ricardo Quevedo as Amici Curiae on behalf of Defendant and Appellant.

Richards, Watson & Gershon, T. Peter Pierce, Amy Greyson and Carrie H. Ahn for Thirty-Four California Cities as Amici Curiae on behalf of Defendant and Appellant.

Roger Jon Diamond for Plaintiffs and Respondents.

Edward Tabash for Council for Secular Humanism as Amicus Curiae on behalf of Plaintiffs and Respondents.

* * *

Objecting to an invocation given at a Burbank City Council meeting which ended with an expression of gratitude and love "in the name of Jesus Christ," plaintiffs sought and were granted injunctive and declaratory relief against the City. The trial court ruled that the inclusion of "sectarian prayer" in city council meetings violated the Establishment Clause of the United States Constitution, and it enjoined the City from allowing sectarian prayer at city council meetings. The trial court also ordered the City to "advise anyone conducting a prayer as part of the City Council meeting that sectarian prayers are not permitted." The City has appealed and contends the judgment is "contrary to a firmly established body of constitutional jurisprudence that holds that the practice of legislative invocations which do not proselytize, promote or disparage any single religion" do not violate the Establishment Clause of the First Amendment. The City further contends that the court order amounts to unconstitutional censorship and viewpoint discrimination.

Because we conclude the invocation violated the Establishment Clause of the First Amendment of the United States Constitution under *Marsh v. Chambers* (1983) 463 U.S. 783, and the court's order did not constitute censorship or viewpoint discrimination under the Free Speech and Exercise Clauses, we affirm the judgment of the trial court.

FACTUAL BACKGROUND

The facts are not disputed. Since 1953 the City of Burbank has had a practice of beginning each city council meeting with an invocation. The invocation is usually given by a member of the Burbank Ministerial Association (BMA), a non-denominational organization of clergy and representatives of other organizations, such as the YMCA, whose members meet for the purpose of fellowship among the religious leaders of the community. BMA is not entirely Christian, but there are, for example, no Moslem, Buddhist, Hindu or Bahai members in the group.

It was the practice of the BMA to circulate a sign-up sheet among its members for volunteers to give the council invocation. The list of volunteers was provided to the city clerk who placed the name of a volunteer on the agenda. Neither the city council nor the city clerk had any input in determining the subject matter or content of the invocation. Although the members of the BMA agreed among themselves that they would be respectful of their members' various and diverse beliefs, they imposed no restrictions on the content of the invocation.

Plaintiff Irv Rubin, who is of the Jewish faith, was present at the city council meeting on November 23, 1999 to give his opinion on a proposed plan for expansion of the Burbank Airport. A member of BMA, who was a minister of the Church of Jesus Christ of Latter Day Saints, gave the invocation which opened the meeting. The invocation concluded as follows: "We are grateful heavenly Father for all that thou has poured out on us and we express our

gratitude and our love in the name of Jesus Christ. Amen."[1]

Plaintiff Roberto Alejandro Gandara, who was raised as a Catholic, was present at an earlier city council meeting at which an invocation was given in which Jesus Christ had not been mentioned.

Rubin and Gandara filed suit for declaratory and injunctive relief, challenging the practice of the City to begin the city council meetings with religious prayers invoking the name of Jesus Christ. After trial, the court found the prayer recited on November 23, 1999 was "sectarian" and violated the Establishment Clause of the First Amendment to the United States Constitution. The court permanently enjoined the City from "knowingly and intentionally allowing sectarian prayer at City Council meetings." The City was ordered to "advise anyone

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[1] The entire test of the invocation was as follows: "Our Father in Heaven, we are grateful to assemble this evening in the capacity of the City Council meeting. We wish to thank thee and express our gratitude for the blessings that we receive each day. We especially are mindful of this week and the Thanksgiving Day to come on which people all over our nation will be expressing gratitude and love unto thee for thy bounteous blessings. [¶]We feel privileged to be part of this community. We are grateful for those who have stepped forward and have been elected to lead this community. Will thou bless them and give them insight and wisdom and those of the city staff who assist and direct the affairs of the city. [¶] Heavenly Father we are grateful for the youth of this community for they are the future and we ask a blessing upon those who teach and lead the youth that they may inspire them to be their best. [¶]We are grateful heavenly Father for all that thou has poured out on us and we express our gratitude and our love in the name of Jesus Christ. Amen."

conducting a prayer as part of the City Council meeting that sectarian prayers are not permitted."

The City timely appealed the judgment.

CONTENTIONS ON APPEAL

The City contends that the trial court erred, asserting (1) pursuant to *Marsh v. Chambers, supra*, 463 U.S. 783, legislative invocations do not violate the Establishment Clause, and the content of legislative prayer is not to be scrutinized where it is not used to proselytize, advance or disparage any one religion; (2) the rule of *Marsh* has not been diluted or abrogated by other Establishment Clause cases; and (3) the regulation of the content of prayer is impermissible viewpoint discrimination.

Three amici curiae briefs have been filed. Margaret Clark et al., representing a mayor, clergy, and other private citizens who reside in cities within the jurisdiction of this court, and Thirty-Four California Cities have filed amici briefs in support of the City of Burbank.[2] The Council for Secular Humanism, a non-profit organization promoting the rights of atheists, has filed an amici brief in support of respondents Rubin and Gandara.[3]

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[2] Amici in support of the City express concern about the effect the trial court's decision will have on their own cities' practice of prayers at council meetings, and that they too will be forced to end the practice of allowing "sectarian" prayers at their council meetings.

[3] The Council for Secular Humanism takes the position that no branch of government should favor religion over non-belief.

DISCUSSION

Standard of Appellate Review

We are presented with constitutional issues, which we review de novo. (*Berry v. City of Santa Barbara*(1995) 40 Cal.App.4th 1075, 1082.) We must decide whether the orders of the trial court violate the First Amendment to the United States Constitution, independent of the trial court's ruling or reasoning. (*Redevelopment Agency v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74.)

Legislative invocations do not violate per se the Establishment Clause.

Both sides agree that this case is governed by *Marsh v. Chambers, supra*, 463 U.S. 783, the only United States Supreme Court case that has decided the issue of legislative prayer. City urges that the judgment of the trial court is an unconstitutional extension of *Marsh*. Respondents argue that the trial court correctly found the invocation unconstitutional.[4]

The issue presented in *Marsh*, as stated by Chief Justice Burger writing on behalf of the majority, was "whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment." (*Marsh, supra*, 463 U.S. at p. 784.) In *Marsh*, a member of the Nebraska Legislature sought to

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[4] Respondents, while otherwise taking the position that *Marsh* should be overruled, concede that for the purposes of this case *Marsh* is controlling.

enjoin this practice claiming that it violated the Establishment Clause. The District Court "held that the Establishment Clause was not breached by the prayers, but was violated by paying the chaplain from public funds." (*Id.* at p. 785.) On appeal, the Eighth Circuit applied the three-part test established by the court in *Lemon v. Kurtzman* (1971) 403 U.S. 602. The *Lemon* test set forth a standard for evaluating statutory violations of the Establishment Clause finding no violation if the following were proven: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (*Id.* at pp. 612-613, citations omitted.)[5] The Eighth Circuit held that the Nebraska policy violated all three elements of the test, and prohibited the state from continuing its established practice. Certiorari was granted by the Supreme Court.

After a review of the historical precedent of prayer in the public legislative context, the Supreme Court found that such prayer was "deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." (*Marsh*, *supra*, 463 U.S. at p. 786.) The court noted, "On September 25, 1789, three days after congress authorized the appointment of

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[5] For application of this standard, see, e.g., *Committee for Public Education v. Regan* (1980) 444 U.S. 646, 653; *Committee for Public Education v. Nyquist* (173) 413 U.S. 756, 772-773; *Hunt v. McNair* (1973) 413 U.S. 734, 741.

paid chaplains, final agreement was reached on the language of the Bill of Rights. . . . Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." (*Id.* at 788.)

The majority in *Marsh* did not evaluate Nebraska's prayer tradition under the *Lemon* test. Instead, as Justice Brennan noted in dissent, the court "carv[ed] out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer." (*Marsh*, *supra*, 463 U.S. at p. 796 (dis. opn. of Brennan, J.).) The majority concluded that the unique history of legislative prayer, which had been established by the members of the First Congress and practiced over two centuries, evidenced the lack of threat to the Establishment Clause from legislative prayer: "We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation [citation], beneficial grants for higher education [citation], or tax exemptions for religious organizations [citation]." (*Marsh*, *supra*, 463 U.S. at pp. 790-791.)

In reviewing the specific prayer in question, the court in *Marsh* found that its characteristics, that a Presbyterian clergyman had been selected to give the invocation for 16 years, that the chaplain was paid at public expense, and that the prayers were in the Judeo-Christian tradition, did not invalidate the practice. (*Marsh*, *supra*, 463 U.S. at p. 793.) But the court specifically noted in the margin that "[a]lthough some of [the] earlier prayers were often explicitly Christian, [the minister] removed all

references to Christ after a 1980 complaint from a Jewish legislator." (*Id.* at p. 793, fn. 14.)

Finally, the court set forth what has since been characterized as the *Marsh*, test: "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." (*Marsh*, *supra*, 463 U.S. at pp. 794-795.)

The trial court's review was not an unconstitutional extension of Marsh.

The City, in defending its practice of opening the city council meetings with prayer, contends the trial court misapplied the *Marsh* test and created its own legal standard "which has no precedential base" and is "contrary to established law." The City asserts the invocations did not serve the purpose of proselytizing, advancing or disparaging any one religion and therefore did not violate the Establishment Clause. Based on that view, the city argues the trial court violated the explicit holding in *Marsh* when it evaluated and parsed the content of the prayer given as the council's invocation on November 23, 1999, improperly focusing on the content of the very last sentence of the prayer that referred to "Jesus Christ" and basing its determination that the prayer was sectarian on that reference alone.

The City and *amici* in support of the City's position contend that under *Marsh* the appropriate test involves an examination of the proselytizing or disparaging content of

the prayer, rather than a determination of the "sectarian" nature of an individual prayer. They argue that the *Marsh* court's mention in footnote 14 of the removal of all references to Christ in the Nebraska prayer is merely dicta in an anecdotal footnote, and this factor is never substantively addressed in the opinion. Thus, the City argues that the trial court's apparent reliance on footnote 14 was misplaced and that the trial court "created its own legal standard which has no precedential support and is in fact contrary to the law."

Respondents contend that the prayer in *Marsh* survived constitutional scrutiny because any reference to Jesus Christ had been removed and that *Marsh* supports the decision of the trial court here.

Amici Margaret Clark et al. argue that as long as the invocation was not used to advance the Christian faith or disparage other faiths, the prayer passed constitutional muster under *Marsh*.

It cannot reasonably be argued that the prayer here, with a specific reference to Jesus Christ, is on the same constitutional footing as the prayer before the court in *Marsh*, from which all reference to a specific religion had been excised. It was therefore incumbent upon the trial court to determine whether "the prayer opportunity had been exploited to proselytize or advance any one, or to disparage any other, faith or belief." (*Marsh*, *supra*, 463 U.S. at pp. 794-795.)

In *Allegheny County v. Greater Pittsburgh ACLU* (1989) 492 U.S. 573, the court considered whether a December holiday display of a crèche in a county courthouse and a menorah outside a city and county building violated the Establishment Clause. In deciding that

question the majority stated that "[w]hatever else the Establishment Clause may mean . . . , it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). 'The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.' [Citation.]" (*Id.* at p. 605.) Nor can government appear "to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" (*Id.* at p. 594, quoting from *Lynch v. Donnelly* (1984) 465 U.S. 668, 687.)

In response to Justice Kennedy's concern about the court's "latent hostility" or "callous indifference" towards religion, Justice Blackmun writing for the majority stated: "On the contrary, the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discrimination among citizens on the basis of their religious faiths. [¶] A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed." (*Allegheny*, *supra*, 492 U.S. at p. 610.)

The court in *Allegheny*, differentiating between the secular and religious aspects of the celebration of Christmas, stated: "Celebrating Christmas as a religious, as opposed to a secular, holiday, necessarily entails professing, proclaiming, or believing that Jesus of Nazareth, born in a manger in Bethlehem, is the Christ, the Messiah. If the government celebrates Christmas as a religious holiday (for example, by issuing an official proclamation

saying: 'We rejoice in the glory of Christ's birth!'), it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief. In contrast, confining the government's own celebration of Christmas to the holiday's secular aspects does *not* favor the religious beliefs of non-Christians over those of Christians. Rather, it simply permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs, an allegiance that would truly favor Christians over non-Christians." (*Allegheny*, *supra*, 492 U.S. at pp. 611-612.)

The court's discussion of *Marsh* in *Allegheny* reflects that it considered the removal of references to Christ to have been essential to the *Marsh* ruling: "Indeed, in *Marsh* itself, the Court recognized that not even the 'unique' history of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'" (*Allegheny*, *supra*, 492 U.S. at p. 603.)

It is clear that the factual predicate upon which the Supreme Court ruled in *Marsh* was a legislative invocation from which all references to a particular religion have been purposely excised. We therefore agree with respondents that the trial court's decision was correct under *Marsh*.

The reference to "Jesus Christ" in the invocation violated the Establishment Clause.

We review the invocation at issue in light of the foregoing considerations. The expression of gratitude and love "in the name of Jesus Christ" was an explicit invocation of a particular religious belief. By directing the prayer to "Our Father in Heaven . . . in the name of Jesus Christ" the invocation conveyed the message that the Burbank City Council was a Christian body, and from this it could be inferred that the council was advancing a religious belief.

The City argues that because only about 20 percent of the volunteers providing the legislative prayer mentioned Jesus Christ in the invocation, it is clear that the prayer opportunity was not being exploited to advance or disparage any one faith or belief. This argument promotes a test that unless a certain incidence of unconstitutional prayer is proven, it cannot be established that one religious belief or faith is being proselytized or advanced over another. We disagree. Rather, we interpret *Marsh* to mean that *any* legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause.

We therefore conclude that, in accordance with the holding in *Marsh*, the invocation offered to Jesus Christ violated the Establishment Clause because it conveyed the message that Christianity was being advanced over other religions. The trial court was correct in its finding.

The prohibition against "sectarian prayer" is within the mandate of Marsh.

City contends that imposing a standard prohibiting "sectarian prayer" is beyond the mandate of *Marsh*, and, indeed, that sectarian prayer in the context of a legislative invocation is constitutionally permitted. City argues that the trial court's review exceeded the only criteria imposed by *Marsh* to assess whether the "prayer opportunity has been exploited" for the purposes of proselytizing, advancing, or disparaging any one belief or faith. (*Marsh*, *supra*, 463 U.S. at p. 795.) We disagree.

As we have discussed, in light of the specific references to the Christian faith in the invocation, as distinguished from the invocation in *Marsh* from which any such reference had been excluded by design, the trial court properly considered whether the prayer opportunity had been exploited for the purpose of proselytizing, advancing or disparaging any one belief or faith. In deciding that it had, the court found the reference to Jesus Christ rendered the prayer "sectarian."

"Sectarian" is defined as relating to or characteristic of a sect.[6] A "sect" is defined as an organized ecclesiastical body, or a religious denomination.[7] The trial court's characterization of the invocation as "sectarian" was merely a definitional determination that the invocation unconstitutionally communicated a preference for one religious faith (or sect) over another. Returning again to the *Marsh* test, in concluding that the prayer was sectarian, the trial court

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[6] Webster's 10th Collegiate Dictionary (2001) page 1053.

[7] Webster's 10th Collegiate Dictionary, *supra*, page 1053.

determined that the prayer opportunity had been exploited to advance one faith, Christianity, over another.[8]

Requiring the council to advise prayer participants that sectarian prayers are not permitted does not amount to unconstitutional censorship or viewpoint discrimination.

City contends that by ordering the City to advise those who volunteer to give the council invocation that sectarian prayers are not permitted, the City is placed in the position of censoring the speech of those who seek to address the city council. City further contends that by "restricting those whose prayer traditions and beliefs require them to pray in the name of Jesus Christ, while allowing others to pray in a manner consistent with their beliefs" the trial court engaged in discrimination based on viewpoint or ideology, in violation of the speaker's right to freedom of speech under the First Amendment. City relies on *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37,[9] *Cornelius v. NAACP Legal Defense & Ed. Fund* (1985) 473 U.S. 788, and *Rosenberger v. Rector and*

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[8] We interpret "exploit" here to mean to make productive use of for one's own advantage. (Webster's 10th Collegiate Dict., *supra*, page 409.)

[9] In *Perry*, a divided Supreme Court held that permitting access to teachers' mailboxes and interschool mail to an incumbent teachers' union and denying access to a rival union did not amount to viewpoint discrimination, because government can impose reasonable regulations on speech, as long as the limitations are necessary to serve a compelling state interest, are narrowly drawn to achieve that end, and are not an effort to suppress expression merely because public officials oppose the speaker's view. (*Perry*, *supra*, 460 U.S. at pp. 45-46.)

Visitors of VA. (1995) 515 U.S. 819[10] to support its contention.

City correctly points out that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." (*Rosenberger*, *supra*, 515 U.S. at p. 829.) But this does not create carte blanche for the speaker.

Whether the trial court's order amounted to unconstitutional censorship or viewpoint discrimination depends on the nature of the speech involved and the manner of restriction imposed. The question of whether prayer in the context of student-led, student-initiated invocations before football games at a public school was "private speech" protected by the Free Speech and Free Exercise Clauses of the First Amendment was answered by the Supreme Court in *Santa Fe Independent School Dist. v. Doe* (2000) 530 U.S. 290. In concluding that such speech was not "private speech," the court noted that "[t]hese invocations are authorized by a government policy and take place on government property at government-sponsored school-related events." (*Id.* at p. 302.) "We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a

[10] In *Rosenberger*, a divided Supreme Court held that denial of funding to a student newspaper with a Christian viewpoint from a university fund created to pay printing costs of student publications was unconstitutional viewpoint discrimination, in that any benefit to religion would be incidental to the government's provision of services on a religion-neutral basis, and denial of funding would be based on the message being communicated. (*Rosenberger*, *supra*, 515 U.S. at pp. 829, 843-844.)

part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment." (*Id.* at p. 307.)

As to whether such speech would be perceived as public or private speech, the *Santa Fe* court said: "In cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.' [Citation.] Regardless of the listener's support for, or objection to, the message, an objective [participant] will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." (*Santa Fe*, *supra*, 530 U.S. at p. 308.) The court held that the invocation delivered over the school's public address system, supervised by school faculty, and in accordance with the school policy that explicitly encourages public prayer was not "private speech." (*Id.* at p. 310.)

The Ninth Circuit in *Cole v. Oroville Union High School Dist.* (9th Cir. 2000) 228 F.3d 1092, followed *Santa Fe* and concluded that a public school district's refusal to allow students to deliver sectarian and proselytizing valedictory speeches as part of a graduation ceremony was necessary to avoid violating the Establishment clause, and therefore did not violate the speaker's free speech rights. (*Cole*, at p. 1102.) "The invocation would not have been private speech, because the District authorized an invocation as part of the graduation ceremony held on District property. . . ." (*Ibid.*)

In light of the fact that the legislative invocation given at the Burbank City Council meeting took place on government property, was authorized by the long standing policy of the city council, was part of the official agenda of the council meeting, and was for the purpose of calling for spiritual assistance in the work of the legislative body, we are satisfied that it was not "private speech." As in *Santa Fe* and *Cole*, an objective observer familiar with the City's policy and implementation would likely perceive that the invocation carried the City's seal of approval. As such those who provide legislative invocations at the Burbank City Council meetings are subject to the requirement that the prayers should comport with the First Amendment.

"For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." (*Perry*, *supra*, 460 U.S. at p. 45.) "In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (*Id.* at p. 46.)

We can think of no more compelling interest than safeguarding the Establishment Clause of the First Amendment to support the restriction ordered here. As stated in *Lynch v. Donnelly* (1984) 465 U.S. 668, "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions,

give the institutions access to government or governmental powers not fully shared by non adherents of the religion, and foster the creation of political constituencies defined along religions lines. . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." (*Id.* at pp. 668, 687-88 (conc. opn. of O'Connor, J.).)

The interest in protecting and safeguarding the fundamental constitutional right to maintain a separation between church and state and to demand neutrality when the interest of religion and government intersect is increasingly more important as our nation becomes more pluralistic. In ordering that the City not permit sectarian prayer at city council meetings and requiring the City to advise those who participate in conducting prayer at city council meetings of this limitation, the trial court drew the regulation as narrowly as possible. The only restriction being imposed on the prayer is that it not be sectarian, that is, that the invocation not be used to advance one faith or belief over another.[11]

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[11] Amicus Thirty-Four California Cities presents an argument in their brief that the terms of the trial court's injunction are ambiguous and therefore unenforceable. This issue was never raised by the parties before the trial court nor discussed by the parties on appeal. While we recognize that this court may consider new issues raised by an amicus on appeal (see *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 709-713),

(Continued on following page)

DISPOSITION

The judgment of the trial court fully comports with *Marsh v. Chambers, supra*, 463 U.S. 783, and is affirmed. Respondents are awarded costs of appeal.

CERTIFIED FOR PUBLICATION

_____, J.
DOI TODD

We concur:

_____, Acting P.J.
NOTT

_____, J.
ASHMANN-GERST

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we decline to do so here. We note that City has not referred to this issue in its reply brief.

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

IRV RUBIN et al., Plaintiffs and Respondents, v. CITY OF BURBANK, Defendant and Appellant.	B148288 (Los Angeles County Super. Ct. No. BC 221942) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT] (Filed Oct. 7, 2002)

THE COURT:

It is ordered that the opinion filed herein on September 9, 2002, be modified as follows:

On page 15, footnote 11 has been modified to read:

Amicus Thirty-Four California Cities presents an argument in their brief that the terms of the trial court's injunction are ambiguous and therefore unenforceable. This issue was not raised by appellant in its opening brief. While we recognize that this court may consider new issues raised by an amicus on appeal (see *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 709-713), we decline to do so here.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

IRV RUBIN AND ROBERTO ALEJANDRO GANDARA, Plaintiffs, vs. CITY OF BURBANK, a municipal corporation, Defendant.	Case No. BC 221942 STATEMENT OF DECISION Judge Alexander H. Williams, III Department 35 November 16, 2000 (Filed Nov. 16, 2000)

I. Procedural History

On December 20, 1999, Plaintiffs filed their complaint seeking declaratory judgment and injunctive relief prohibiting the City of Burbank from commencing City Council meetings with prayer invoking the name of Jesus Christ.

A Court Trial was conducted on November 3 and November 16, 2000.

The Court hereby issues its Tentative Decision and Proposed Statement of Decision.

II. Acknowledgements

The Court commends all involved in this case for the respect and consideration they have shown for each other, for the Court, and for the Constitution. Counsel for both sides, and all parties and witnesses, have displayed the utmost commitment to the exercise of their duties in a fashion that respects the rights of all in the highest traditions of our Constitution.

III. Decision

A. Facts

On November 23, 1999, the Burbank City Council met in official regular session. A tape of pertinent parts of the meeting was admitted into evidence in this trial.

The presiding officer, after welcoming all in attendance, said "We will begin tonight's meeting with an invocation by . . . " and identified a minister from a local church who would give the invocation.

The presiding officer, the other members of the Council and, from the appearances on the tape, all others in attendance, rose to their feet. The minister went to the lecturn centered in front of the Council members and delivered an invocation.

The contents of the invocation are not the subject of contention in this law suit, except for the last words, wherein the minister concluded by saying " . . . and we express our gratitude and our love in the name of Jesus Christ. Amen."

The minister delivering the invocation was an unpaid volunteer provided by the Burbank Ministerial Association, a non-governmental organization whose current membership includes Christian and Jewish clergy members. The BMA has provided volunteer clergy members to offer invocations at Burbank City Council meetings for a number of years. All observers reported that references to Jesus Christ have been made in less than fifty per cent of the invocations.

Neither the City of Burbank nor the Burbank Ministerial Association provides any instructions or guidance to clergy members as to the content of invocations. Nor does either wish to do so.

Some members of the BMA by training and/or conviction find themselves required to invoke their particular deity and beliefs whenever they pray, even in environs outside the confines of their sect. Others, as a matter of philosophy or consideration and respect, are willing and able to, and frequently do indeed, offer public invocations in a manner that does not refer to the beliefs of a particular sect. In other words, many members of the clergy are available to offer non-sectarian prayer at Burbank City Council meetings.

B. Law

Because the Court deems the decision in this case to be driven by the requirements of the Constitution of the United States of America, no address is being made to the requirements of the Constitution of the State of California.

The First Amendment to the United States Constitution (which is also therefore the First of our Bill of Rights) guarantees to all the free exercise of religion (Free Exercise Clause) and prohibits the government from taking any steps to effect the establishment of religion (Establishment Clause).

The United States Supreme Court has consistently recognized "the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions' significance. But such religious activity

. . . must comport with the First Amendment." *Santa Fe Independent School District v. Doe*, ___ U.S. ___, 120 S.Ct. 2266, 2278 (2000).

The Establishment Clause is not violated when a legislative session is opened with a prayer by a chaplain. Indeed, the chaplain can be paid by the government. *Marsh v. Chambers*, 463 U.S. 783 (1983). The Court said: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Marsh*, 463 U.S. at 786.

However, it is important to note that the Supreme Court in *Marsh* was dealing with a prayer which made no reference to Jesus Christ. *Marsh*, 463 U.S. at 793, footnote 14. This is significant, because the Court went on to say: "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh*, 463 U.S. at 794-5.

Does an expression of "our gratitude and our love in the name of Jesus Christ" render a prayer impermissibly sectarian in violation of the Establishment Clause? The case law since *Marsh* inescapably suggests that it does. In numerous decisions, prayer invoking the name of Jesus Christ has been identified as sectarian, and prayer that does not has been identified as acceptably non-sectarian.

See County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989); *Lee v. Weissman*, 505 U.S. 577, 589 (1992); *Santa Fe Independent School District v. Doe*, ___ U.S. ___, 120 S.Ct. 2266 (2000).

It should be noted that this case does not involve the even more difficult issue of school prayer. In such cases, the Supreme Court has held that, due to the unique susceptibility of adolescents to peer and social pressure and the control that school authorities necessarily have over student activities, even non-sectarian prayer at school events violates the Establishment Clause. *Lee v. Weissman, supra; Santa Fe Independent School District v. Doe, supra*. By contrast, with respect to legislative sessions, the status of the law today is that non-sectarian prayer is permitted but sectarian prayer is not.

Finally, is it permissible under the Constitution for the City of Burbank to provide guidance concerning the content of invocations offered as part of City Council meetings? Plainly it is. "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capitol Square Review & Advosory* [sic] *Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995).

IV. Finding.

The Court therefore finds for the Plaintiff and against the Respondent. The Court will enter Declaratory Judgment that opening the City Council meeting on November 23, 1999 with the prayer in this case violated the Establishment Clause of the United States Constitution. The Court will issue an Injunction prohibiting the inclusion of sectarian prayer in City Council meetings.

In making this determination, the Court repeats its appreciation of the respect that all parties, counsel and witnesses have displayed in this case. The Court fully understands the reluctance of the City Council and the Burbank Ministerial Association to dictate the content of prayer. All that is required is an advisement that sectarian prayer as part of City Council meetings is not permitted under our Constitution. From the evidence adduced at trial, the Court is confident that such guidance is acceptable to a large number of clergy members who will continue to provide the volunteer service that they have so commendably provided to the City Council and to the people of the City of Burbank throughout the years.

Date: November 16, 2000

/s/ Alexander H. Williams III
ALEXANDER H. WILLIAMS III

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 11/16/00

HONORABLE ALEXANDER H. WILLIAMS III JUDGE

HONORABLE JUDGE PRO TEM

5.

NONE Deputy Sheriff

DEPT. 35

F. MOREAU DEPUTY CLERK

R. E. LEE CRTRM ASST.

ELECTRONIC RECORDING MONITOR

TRACEY WILSFORD, CSR 7115 Reporter

1:30 pm	BC221942	Plaintiff
	IRV RUBIN	Counsel ROGER JON DIAMOND (X)
	VS	Defendant
	CITY OF BURBANK	Counsel JULI C. SCOTT (X)

NATURE OF PROCEEDINGS

COURT TRIAL AO

Trial continued from November 3, 2000, resumes with all counsel present as heretofor.

All sides rest. The Court distributes a written tentative ruling and the cause is argued.

The Court adopts the Court's written Tentative Decision, it is signed and filed this date, and incorporated herein by reference.

The Court finds for the Plaintiff and against the defendant. The Court will enter Declaratory Judgment that opening the City Counsel meeting on November 23, 1999 with the prayer in this

case violated the Establishment Clause of the United States Constitution The Court will issue and [sic] Injunction prohibiting the inclusion of sectarian prayer in City Council meetings.

All exhibits are ordered returned to submitting Counsel to be held and preserved pending expiration date of time for appeal.

Counsel for the Plaintiff is to prepare and submit proposed Injunction.

APPENDIX D

Court of Appeal, Second Appellate District,
Division Two – No. B148288
S110765

IN THE SUPREME COURT OF CALIFORNIA

En Banc

IRV RUBIN, Plaintiff and Respondent,

v.

CITY OF BURBANK, Defendant and Appellant.

(Filed Dec. 18, 2002)

Petition for review DENIED.

Baxter, J., and Brown, J., are of the opinion the petition should be granted.

/s/ GEORGE
Chief Justice

Supreme Court, U.S.
FILED
APR 18 2003
OFFICE OF THE CLERK

(2)

No. 02-1379

IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF BURBANK,
Petitioner

v.

IRV RUBIN AND ROBERTO ALEJANDRO GANDARA,
Respondents.

On Petition For Writ of Certiorari to the
Court of Appeals of California, Second Appellate District,
Division Two

BRIEF AMICUS CURIAE OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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Steven H. Aden (Counsel of Record)
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Charlottesville, VA 22901
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April 18, 2003

20 pp

QUESTIONS PRESENTED FOR REVIEW

The Burbank City Council has been enjoined from allowing "sectarian" prayers at any city council meeting, and has been ordered to advise individuals giving a legislative invocation at all meetings that "sectarian" prayers are not permitted. The following three questions are presented here:

1. Whether the allowance of a single or occasional "sectarian" prayer offered by citizen volunteers at a public meeting of a legislative body constitutes the "advancement" of a particular religious ideology by the legislative body, in violation of the Establishment Clause of the First Amendment to the United States Constitution and the Court's decision in *Marsh v. Chambers*, 463 U.S. 782 (1983)?

2. Does the legislative prayer practice dictated by the California courts – which now requires California legislative bodies to ascertain whether prayers in their meetings are "sectarian" and then ban such prayers under penalty of contempt – violate the Establishment Clause by impermissibly entangling government with religion?

3. Whether a legislative body, which is now required to determine whether a legislative prayer is "sectarian" and to prohibit any such "sectarian" prayer, engages in viewpoint discrimination in violation of the Free Speech Clause of the First Amendment to the United States Constitution and this Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)?

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STATEMENT OF INTEREST OF *AMICUS CURIAE* AND INTRODUCTION[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia. John W. Whitehead founded the Institute in 1982. Its mission is to educate individuals about their civil liberties and to provide free legal representation to those whose constitutional rights are violated. Attorneys affiliated with the Institute have appeared as counsel before the Court in significant First Amendment cases, *e.g.*, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), and have filed *amicus curiae* briefs in numerous First Amendment cases.

The Rutherford Institute supports the Petitioner's request for a writ of certiorari because it regards the case as an opportunity for the Court to clarify vital issues of First Amendment jurisprudence that remain extant. Specifically, this case presents an opportunity for the Court to reiterate that private religious speech, even when it occurs in the public arena, does not violate the Establishment Clause, which precludes government actors from manifesting religious preferences. The case also presents an opportunity for the Court to correct the growing misconception that the Establishment

---

[1] Counsel of record to the parties in this case have consented to the filing of an *amicus curiae* brief by The Rutherford Institute, and letters reflecting said consent are on file with the clerk of the Court. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Clause is somehow less offended by non-sectarian prayer than by sectarian prayer.

SUMMARY OF ARGUMENT

This Court has consistently acknowledged that while the First Amendment precludes government actors (in their capacity as such) from manifesting religious preferences, it also provides a bulwark for the religious speech of private individuals. The Establishment Clause is not offended when private individuals engage in religious speech. To the contrary, the Free Speech and Free Exercise of Religion Clauses of the First Amendment protect this "private speech" from governmental censorship.

In this case, the California appellate court has committed a grievous error in holding that invocations delivered by private individuals at Burbank's City Council meetings violate the First Amendment's Establishment Clause. The holding rests on a startling proposition – that individuals are transformed into government actors merely by virtue of the fact that their speech occurs on government property and addresses a government entity that has allowed the speech to occur. While this aspect of the holding alone represents a marked departure from the Court's Establishment Clause jurisprudence, the error is compounded by the fact that the court below resolved the weighty issue before it without so much as a perfunctory application of this Court's venerable *Lemon* test.

The holding of the court below essentially forecloses the possibility that a private individual could ever deliver a sectarian prayer at the meeting of a city council or other deliberative body without creating an Establishment Clause violation. A juxtaposition

of the lower court's holding in this case with this Court's holding in *Marsh v. Chambers*, 463 U.S. 783 (1983), highlights the counterintuitive nature of the lower court's holding in this case. The Court's *amicus* fails to discern how the Establishment Clause could reasonably be interpreted to permit state legislatures to initiate and fund a practice of opening their sessions with invocations delivered by a pastor of a single Christian denomination, provided the prayer is non-sectarian, but not to permit private individuals to voluntarily deliver prayers at city council meetings unless the city council restricts the content of the prayers.

The Court's *amicus* respectfully submits that the censorship of private religious speech at city council meetings is not required by *Marsh v. Chambers*, is not indicated by this Court's Establishment Clause jurisprudence, and, in fact, turns the First Amendment on its head.

ARGUMENT

I. CERTIORARI IS APPROPRIATE IN THIS CASE BECAUSE THE CALIFORNIA COURT'S HOLDING REPRESENTS A DRAMATIC DEPARTURE FROM THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE IN THAT IT SUBJECTS NON-GOVERNMENT SPEECH TO ESTABLISHMENT CLAUSE ANALYSIS OUTSIDE OF THE PUBLIC SCHOOL CONTEXT.

The Rutherford Institute respectfully submits that the central question in this case, as in all Establishment Clause cases, is whether the religious speech in question constitutes private speech or government speech. "[T]here is a crucial difference between government speech endorsing religion, which the Establishment

Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clause protect." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000)(quoting *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990)(plurality opinion)); *accord Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 841 (1995).

However, this question was clearly not primary to the California appellate court's analysis. At first the court avoided the question entirely. It stated:

> By directing the prayer to "our Father in Heaven ... in the name of Jesus Christ" the invocation conveyed the message that the Burbank City Council was a Christian body, and from this it could be inferred that the council was advancing a religious belief.... [W]e interpret *Marsh* to mean that any legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause. We therefore conclude that, in accordance with the holding in *Marsh*, the invocation offered to Jesus Christ violated the Establishment Clause because it conveyed the message that Christianity was being advanced over other religions.

Rubin v. City of Burbank, 101 Cal.App.4th 1194, at 1204 (2000). This portion of the opinion reveals that the lower court has taken a giant logical leap from a determination that the invocation in question was Christian in nature to a determination that the City has violated the Establishment Clause. No discussion of whether the invocations constituted government speech or private speech preceded this conclusion or was indicated as forming its premise. The court has thus found an Establishment Clause violation based

on the type of prayer delivered (*i.e.*, sectarian) rather than the identity of the speaker or the role, if any, of the government entity in bringing about the invocation.

The court below proceeded to what should have been the heart of the Establishment Clause analysis only as it declared that the City would not be engaging in viewpoint-based discrimination or censorship by advising members of the public that sectarian prayers would not be permitted. *Id.* at 1206. In that portion of its opinion, the court purported to rely upon two school prayer cases in determining that the invocations delivered at City Council meetings did not constitute "private speech." *Id.* at 1206-07 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) and *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000)).

However, the court does not appear to have been truly convinced that the invocations were not private speech, and its actual analysis belies this pronouncement in several respects. First, while stating that the prayers were not private speech, the court was careful to never identify the invocations as "government speech." This phrase is conspicuously absent from the opinion, as the prayers presumably fall into one category or the other.

Second, the court stated:

> City correctly points out that "the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." But this does not create carte blanche for the speaker. Whether the trial court's order amounted to unconstitutional censorship or viewpoint discrimination depends on the nature of the speech involved

and the manner of restriction imposed.

Id. at 1206 (citations omitted).

This type of analysis is wholly inconsistent with the court's apparent determination that the invocations constitute government speech for purposes of Establishment Clause analysis. Where the government itself is the speaker, transmitting its own message, the First Amendment does not preclude it from making viewpoint-based decisions. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (citing *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000)). It is puzzling, then, that the court below declared the invocations to be something other than private speech, yet examined the restrictions that the trial court required the City Council to impose upon speakers under a strict scrutiny analysis. *Rubin*, 101 Cal. App. 4th at 1207.

The court's analysis points to the glaring fact, tacitly acknowledged by the court, that the invocations delivered voluntarily by private individuals at City Council meetings simply do not constitute "government speech" merely by virtue of the fact that they are allowed by the City and occur on government property. Because they do not constitute government speech, the prayers necessarily fall into the category of private speech and, thus, are not within the ambit of the First Amendment's Establishment Clause. Rather, they are protected by the Free Speech and Free Exercise clauses.

In reaching its conclusion that the invocations were not private speech, the court cited the following factors: (1) the City Council meeting took place on government property; (2) the invocations

were authorized by longstanding policy; (3) the invocations were included on the Council's agenda; and (4) the prayers called for spiritual assistance in the work of the Council. *Id.* at 1207.

It is unclear why the court considered these factors to be the touchstone of government speech. Factors one through three characterize any and all speech by City residents who attend the Council's meetings and take advantage of the opportunity provided for them to speak at various stages of the meetings. All such speech occurs on government property and is authorized by the Council's longstanding policy of designating particular portions of the meeting for public comment; these portions are designated on the City Council's official agenda.

With respect to the fourth factor, it is unclear why it is relevant in any way. Surely private speech is not converted to government speech by virtue of the fact that it is religious in nature. The court may have meant to emphasize that the invocations addressed the City Council specifically, but this factor also characterizes all or most comments by private individuals who speak out at the meetings.

According to the court's analysis, any speech by private individuals at City Council meetings constitutes "government speech." But this proposition is demonstrably untrue, for in that event the court has opened the door for City officials to silence any and all speakers at City Council meetings if it dislikes their viewpoint. *See Velazquez, supra; Southworth, supra*, 529 U.S. at 229; *Rosenberger, supra*, 515 U.S. at 833.

The Court's *amicus* respectfully submits that such a result cannot be countenanced by this Court. Speech at City Council

meetings by those members of the public who choose to actively participate in the workings of their local government constitutes private speech that is protected by the very core of the First Amendment. This is so whether the speech is religious or secular in nature.

II. THE CALIFORNIA APPELLATE COURT'S HOLDING REPRESENTS A SIGNIFICANT AND UNWARRANTED EXTENSION OF THIS COURT'S HOLDING IN *SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE*.

In announcing the four factors that led to its determination that the invocations at City Council meetings did not constitute private speech, the court below relied upon this Court's holding in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, and upon the Ninth Circuit's holding in *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092. The Court's *amicus* respectfully submits that the court's reliance upon these cases, both of which involved speeches delivered by high school students at school-sponsored events, is inappropriate. If the court's decision in this case is allowed to stand, it will operate as precedent for future holdings that erase the line between government speech and private speech for Establishment Clause purposes. The eventual result will be the elimination of private religious speech from the public sphere.

In *Santa Fe* itself, this Court cautioned that not all messages that are authorized by government policy and take place on government property at government-sponsored events constitute government speech. 530 U.S. at 302. In concluding that the invocations delivered by students at high school football games pursuant to a detailed school policy were, in effect, government speech, the Court relied heavily on two important factors. First, the

school allowed only one student to deliver the messages for an entire season. *Id.* at 303. Second, the Court pointed to the fact that school officials regulated the content and topic of each student's message. *Id.*

The absence of those factors clearly distinguishes *Santa Fe* from this case. Moreover, it is interesting to note that according to *Santa Fe* and other of this Court's Establishment Clause cases, the City of Burbank would actually move toward an Establishment Clause violation by complying with the lower court's order to inform participants that they may only deliver "non-sectarian" invocations. It is unacceptable for the government to endorse only "civic" or "non-sectarian" prayers because, at best, this narrows the number of people who object to the prayer and, at worst, increases their "sense of isolation and affront." *Id.* at 305 (quoting *Lee v. Weisman*, 505 U.S. 577, 594 (1992)). Accordingly, a reviewing court's function should be to determine whether the religious speech constitutes private speech or government speech in the first instance, rather than to order that any religious speech be diluted so as to render it "inoffensive."

The Rutherford Institute submits that the California appellate court's holding represents a dramatic extension of this Court's holding in *Santa Fe* because it applies *Santa Fe* to hold that religious speech loses its private character merely by virtue of the fact that it occurs on government property at a government-sponsored event. The court effectively jettisoned this Court's practice of analyzing the specific policy, if any, that resulted in religious speech and the extent of the government's involvement, if any, in determining or restricting the content of the speech. The Court's *amicus* respectfully submits that by divorcing the *Santa Fe* holding from these essential underlying elements of this Court's

analysis, the court below has extended *Santa Fe* in a manner that banishes private religious speech from the public sphere by commandeering it and labeling it non-private speech.

III. CERTIORARI IS APPROPRIATE IN THIS CASE BECAUSE REVIEW WOULD ALLOW THE COURT TO CLARIFY THE PROPER PLACE OF *MARSH V. CHAMBERS* IN MODERN ESTABLISHMENT CLAUSE ANALYSIS OF CASES INVOLVING PRAYER AT GOVERNMENTAL DELIBERATIVE BODY MEETINGS.

While the Justices of this Court have at various times expressed their dissatisfaction with the test announced by the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) as the proper standard for analysis of Establishment Clause questions, that standard has not been overruled. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395, n.7 (1993) ("[W]e return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled. This case... presents no occasion to do so."). Because *Lemon* has not been overruled, The Rutherford Institute respectfully submits that lower courts are obligated to apply it in deciding Establishment Clause questions, notwithstanding that this Court may disregard it in certain instances.

The absence of the *Lemon* analysis in the lower court's opinion is more troubling because of the court's misapplication of this Court's holding in *Marsh*. Specifically, the court below appears to have determined that because it considered the case to be distinguishable from *Marsh* on its facts, the invocations delivered at the City Council meetings necessarily violated the Establishment Clause. The court stated:

> [W]e interpret *Marsh* to mean that any legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause. We therefore conclude that, in accordance with the holding in Marsh, the invocation offered to Jesus Christ violated the Establishment Clause because it conveyed the message that Christianity was being advanced over other religions.

101 Cal.App. 4th at 1204.

The problem with this reasoning is that the *Marsh* Court did not, in fact, hold that any sectarian, proselytizing prayer delivered before a deliberative body violated the Establishment Clause. Rather, the Court in *Marsh* held that the invocations regularly delivered before the state legislature's sessions by a Presbyterian chaplain who was paid by the legislature did not violate the Establishment Clause. *Marsh*, 463 U.S. at 794. This is the converse of the lower court's holding in this case.

The Court's *amicus* respectfully submits that the court below erred in concluding that because the prayers in this case are factually distinguishable from those considered in *Marsh*, the inevitable result is an Establishment Clause violation. While the Court in *Marsh* alluded to the fact that the invocations actually delivered by the Presbyterian minister were non-sectarian, it did so in explaining that it was not necessary in that case for the Court to "embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 794-95. The court below has thus attributed to *Marsh* a holding that is not found in the Court's opinion. Upon determining the *Marsh* rule to be inapplicable because of factual distinctions, the proper course would have been for the court to apply the traditional *Lemon* test analysis. Pursuant

to that test, the invocations should have been upheld.

Lemon requires government policies to have a secular purpose, to have a primary effect that neither advances nor inhibits religion, and to avoid entangling government with religious matters. *Lemon*, 403 U.S. at 612-13. Here, the City's practice of allowing local volunteers to deliver invocations at City Council meetings has the secular purpose of allowing all City residents to participate in their local government's activities.

The primary effect of the practice is not to advance or inhibit religion, but rather to maintain a position of neutrality toward religion. This is so because the City's practice entailed no government choice of speakers and no government-imposed restrictions on the content of the individuals' speech. The mandate of the Establishment Clause is respected, not offended, by government policies of neutrality toward religious and secular speech. *See generally Widmar v. Vincent*, 454 U.S. 263 (1981) (declaring unconstitutional a university's policy of excluding religious groups from access to university buildings); *Good News Club*, 533 U.S. 98 (permitting religious club to meet on school premises on same terms as secular clubs would not violate Establishment Clause); *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990) (upholding federal Equal Access Act against Establishment Clause challenge).

Certainly the City's practice involved no entanglement of the government with religious matters. Indeed, it is the lower court's ruling, which requires the City Council to become involved in restricting the content of religious messages, that creates a serious entanglement problem. *See, e.g., Widmar*, 454 U.S. at 272, n.11 (observing that officials would pose a greater entanglement problem

by monitoring speech to exclude religious content than by permitting religious speech on the same terms as it permitted secular speech).

The issue that cannot be avoided in this case is that the distinction made by the court below between sectarian and non-sectarian prayer is not indicated by any of the tests applied by this Court in deciding Establishment Clause cases. Nor should it be a dispositive distinction. The Establishment Clause forbids the government to establish a "civic" religion just as it forbids it to establish an exclusive Christian one. *See Lee v. Weisman*, 505 U.S. at 590 ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."); *Board of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) (noting that the principle at the heart of the Establishment Clause is that government may not prefer one religion to another, or religion to irreligion). The lower court's attempt to broaden the appeal of prayers delivered by private individuals at City Council meetings engenders the type of entanglement with religion that the Establishment Clause prohibits.

The Rutherford Institute respectfully submits that the court below has seriously undermined the First Amendment and this Court's Establishment Clause jurisprudence by misapplying the *Marsh* holding and by ordering a government entity to censor private religious speech.

CONCLUSION

The court below has entered a decision that essentially allows local government officials to censor any speech that occurs at government meetings on government property and requires them to censor religious speech that occurs under those circumstances. Rejecting this Court's longstanding Establishment Clause analysis, the California court concluded that the invocations delivered at City Council meetings were unconstitutional because their content may not be acceptable to every religious sect.

The Court's *amicus* respectfully submits that the lower court's novel form of Establishment Clause analysis turns the First Amendment on its head. The errors committed by the court below affect what is perhaps the most fundamental freedom of Americans – the freedom to engage in religious speech. The Rutherford Institute prays that the Court will grant certiorari to correct these grievous errors and thus ensure that the California court's holding may not be used to banish private religious speech from the public sphere.

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In the
Supreme Court of the United States

THE CITY OF BURBANK,
Petitioner,

v.

IRV RUBIN AND ROBERTO ALEJANDRO GANDARA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND DISTRICT, DIVISION TWO

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

ADDITIONAL QUESTION PRESENTED

In addition to the three questions presented by Petitioner, Respondents submit that this case also presents this Court with the opportunity to overrule Marsh v. Chambers, 463 U.S. 783 (1983), which upheld on a six to three vote prayers at legislative sessions. Although this Court need not overrule Marsh v. Chambers, supra, in order to affirm the judgment below this Court could utilize this case for the purpose of revisiting and overruling Marsh v. Chambers. Respondents advised the trial court, the California Court of Appeal, and the California Supreme Court that Marsh v. Chambers was wrongfully decided by this Court and should this case ever reach this Court Respondents would ask this Court to overrule Marsh v. Chambers. Respondent did concede that the trial court, the State Court of Appeal, and the State Supreme Court were all bound by Marsh v. Chambers and also contended that even if Marsh v. Chambers was valid the prayer in this case nevertheless violated the Establishment Clause of the First Amendment.

This issue is implicit in the overall questions presented in the certiorari petition and may be reached by this Court although it is not essential that this Court decide it. See Rule 14.1(a) and Vance v. Terrazas, 444 U.S. 252, 258-259, n.5, 100 S.Ct. 540, 544-545 n.5 (1980).

PARTIES TO THE PROCEEDINGS

The Petitioner is the City of Burbank, a municipal corporation organized and existing under the laws of the State of California.

The Respondents are Irv Rubin and Roberto Alejandro Gandara, both individuals. Irv Rubin recently died and his widow, Shelley Rubin, is willing to become a party to this proceeding by order of this Court or by order of the California courts. Whether or not officially made a party to these proceedings Shelley Rubin has standing under California law to enforce the permanent injunction issued in favor of her late husband and also issued in favor of Respondent Roberto Alejandro Gandara, who is very much alive and well.

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The second and third questions presented by the Petition are not worthy of this Court's review.

With respect to the second question, of necessity the judicial branch must enforce the Establishment Clause of the First Amendment. Courts must be free to issue injunctions to make sure that the Establishment Clause is obeyed. There are numerous examples of injunctions enforcing the Establishment Clause.

In Lee v. Weisman, 505 U.S. 577, 120 L.Ed.2d 467, 112 S.Ct. 2649 (1992) a public school student and her father brought a lawsuit in the federal court seeking a permanent injunction to prevent the inclusion of invocations and benedictions in the form of prayer at graduation ceremonies at city public schools. The lawsuit was prompted by the delivery of a prayer by Rabbi Leslie Gutterman. The Rabbi's prayer is set forth in the opinion of this Court. The federal district court granted relief holding that the invocations and benedictions violated the Establishment Clause of the First Amendment. The district court issued a permanent injunction which prohibited school officials from allowing the practice to continue. The United States Court of Appeals for the First Circuit affirmed and this Court affirmed.

In Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987), the Sixth Circuit reversed the judgment of the district court and ordered it to issue an appropriate injunction to prohibit invocations and benedictions that ". . . employ the language of Christian theology and prayer. . . ." Id. at 1410.

If Petitioner is contending that it, as a city government, cannot become entangled with religion otherwise it would violate the Establishment Clause, such a contention is invalid. Legislative bodies, school boards, and principals must from time-to-time decide whether or not a particular speech is religious in nature and whether or not it violates the Establishment Clause.

In Santa Fe Independent School District v. Doe, 530 U.S. 290, 147 L.Ed.2d 295, 120 S.Ct. 2266 (2000), this Court held unconstitutional a prayer recited by a student at a high school football game in Texas. As a result of this Court's decision, Texas schools will have to determine whether or not particular recitations constitute prayers. Since the Establishment Clause is binding on all branches of government at both the federal and local levels, of necessity governmental institutions must determine whether or not a particular message is a prayer or not. The determination as to whether a particular statement constitutes a prayer does not entangle the government in the process of making that determination. Moreover, even assuming prayers are acceptable so long as they are non sectarian, some governmental entity must make that decision. Again, the determination as to whether a particular prayer is valid or not or whether something constitutes a prayer at all does not entangle the government in religion to such an extent that the Establishment Clause is violated. It cannot be that the enforcement of the Establishment Clause is itself a violation of the Establishment Clause. In a nut shell that is the argument of Petitioner and it is simply not the law.

The third question posed by Petitioner is likewise unworthy of this Court's review. In particular, Petitioner states that the determination by a legislative body as to whether a particular prayer is sectarian or non sectarian does

not constitute view point discrimination. The very case cited by Petitioner in question number three does not support Petitioner. This Court stated in Good News Club v. Milford Central School, 533 U.S. 98, 114, 121 S.Ct. 2093, 2103, 150 L.Ed.2d 151 (2001),

> "We have said that a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content - based discrimination. . . . However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify view point discrimination. . . ."

This Court went on to conclude in Good News Club v. Milford Central School, supra, that the Establishment Clause issue need not be decided because the school had no valid Establishment Clause interest.

Here the issue of discrimination is not present because the prayer in this case before the Burbank City Council was part of the City Council program. This case does not involve some private citizen walking into a City Council meeting off the street and attempting to address the City Council. Here the invocation was part of the program. If the Mayor of the City of Burbank could not recite the prayer at issue here neither could he or she delegate the task of reciting the prayer to someone who is part of the program and who is listed on the agenda. This case involves government speech, not private speech. The free speech provision of the First Amendment does not protect government speech but only private speech. See Santa Fe Independent School District v. Doe, supra, and Cole v. Oroville Union High School District, 228 F.3d 1092 (9th Cir. 2000).

This leads us to the first question presented. It could have been phrased a little more neutrally because it makes reference to a "prayer offered by citizen volunteers at a public meeting of a legislative body . . . ." The so called "citizen volunteer" in this case happened to be a minister officially designated by the City Council to be the one to provide the invocation. His name was on the agenda and the prayer was offered as part of the meeting. If this Court should grant certiorari it will have the entire City Council tape, including the first portion with the prayer, to review.

In any event, Respondents concede that the first question presented might be worthy of review because the uncertainty as to whether sectarian prayer is permissible was created by two decisions of this Court. Also, this Court may wish to distinguish local city council meetings from state or federal legislative meetings, although Respondents concede that city council prayers have been upheld by lower courts: Society of Separationists, Inc. v. Whitehead, 870 P.2d 916 (Utah Supreme Court 1993), Marsa v. Wernik, 86 N.J. 232; 430 A2d 888 (New Jersey Supreme Court 1981), Lincoln v. Page, 109 N.H. 30; 241 A2d 799 (New Hampshire Supreme Court 1968). See also Bogen v. Doty, 598 F.2d 1110 (8th Cir.1979) and Snyder v. Murray City Corp., 159 F.3d 1227 (10th Cir. 1998) (en banc).

The United States District Court for the Central District of California came to the opposite conclusion regarding prayers invoking the name "Jesus Christ" in Bacus v. Palo Verde Unified School District, 11 F.Supp.2d 1192 (C.D. Cal. 1998). The District Court's published decision was reversed by the Ninth Circuit in an unpublished memorandum on December 3, 2002 (Bacus v. Palo Verde Unified School District, 52 Fed. Appx. 355. (9th Cir. 2002).

The California Court of Appeal below correctly followed this Court's precedents - Marsh v. Chambers, 463 U.S. 783, 77 L.Ed. 2d 1019, 103 S.Ct. 3330 (1983) and County of Allegheny v. ACLU, 492 U.S. 573, 106 L.Ed.2d 472, 109 S.Ct. 3086 (1989). Marsh v. Chambers, supra, involved the retention by the Nebraska legislature of a Presbyterian minister, Robert E. Palmer, to serve as a Chaplin at a monthly salary for each month the Nebraska legislature was in session. This Court noted in its opinion, footnote 14, that Palmer's earlier prayers were often explicitly Christian . . . ."

According to the District Court's opinion, Chambers v. Marsh, 504 F.Supp. 585 (D.C. Neb. 1980), the Eighth Circuit's decision, Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982), and this Court's decision, Marsh v. Chambers, supra, Senator Chambers, a duly elected member of the Nebraska legislature, found some of the prayers so offensive to his values that he excused himself on occasions during the prayers. A non Christian, Senator Chambers filed the lawsuit in the federal district court in Nebraska complaining about the compensation of Palmer and his offering of daily prayers. Apparently Palmer removed all references to Jesus Christ in response to the complaint filed by Senator Chambers. The U.S. District Court found the prayers were permissible but that the Chaplin should not have been compensated by the state. The Sixth Circuit affirmed in part and reversed in part. The Sixth Circuit held that the entire legislative prayer practice was unconstitutional. In granting certiorari, this Court stated that it was limiting the question presented to "whether the Nebraska legislature's practice of opening each legislative day with a prayer by a Chaplin paid by the state violates the Establishment Clause of the First Amendment."

It should be noted that this Court did not grant certiorari to determine whether the particular prayer itself was proper. After granting certiorari to resolve only one question of the four questions presented, six Justices of this Court held that the practice of opening legislative sessions with prayer had become part of the fabric of American society and did not violate the Establishment Clause. Three Justices dissented.

As stated earlier, Respondents did contend both in the trial court, the State Court of Appeal, and the State Supreme Court that this Court wrongfully decided Marsh v. Chambers. However, Respondents did concede that so long as Marsh v. Chambers is the law the lower courts were obligated to follow it. Respondents argued below that the injunction granted by the trial court did not violate Marsh v. Chambers but rather was consistent with it.

This Court made it clear in County of Allegheny v. ACLU, 492 U.S. 573, 106 L.Ed.2d 472, 109 S.Ct. 3086 (1989), that what saved the prayer in Marsh v. Chambers was the removal of Jesus Christ from the prayer.

In the County of Allegheny case this Court addressed the constitutionality of the placement of a creche at the County Courthouse and the placement of the Chanukah Menorah outside a city and county building. This Court held that the display of the creche violated the Establishment Clause but that the display of the Menorah next to the Christmas tree did not. No challenge had been made to the Christmas tree itself. Justice Blackmun wrote the opinion for the court and while his entire opinion did not command the majority of the Justices part V of his opinion did.

Specifically, in Part V A in the opinion for the Court, Justice Blackmun stated,

> ". . . However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." 492 U.S. at 603, 109 S.Ct. at 3106.

Blackman then referred specifically to Marsh v. Chambers, supra:

> "Indeed, in Marsh itself, the Court recognized that not even the 'unique history' of legislative prayer, 463 U.S., at 791, 103 S.Ct., at 3336, can justify contemporary legislative prayers that have the effect of affiliating the government with anyone specific faith or belief. Id., at 794-795, 103 S.Ct., at 3337-3338. The legislative prayers involved in Marsh did not violate this principle because the particular chaplain had "removed all references to Christ." Id., at 793, n. 14, 103 S.Ct., at 337, n. 14...."

The portion of the opinion in County of Allegheny v. ACLU, supra, quoted above can be found at 492 U.S. at 603, 109 S.Ct. at 3106. As stated, four other justices joined this portion of Justice Blackmun's opinion for the Court.

The five justice majority, speaking through Justice Blackmun, reiterated this point (the government may not sponsor sectarian religious practices) in footnote 55 when the Court rejected Justice Kennedy's dissenting opinion and stated

that the historical justification for non sectarian legislative prayers could not be used support ". . . references to exclusively Christian creeds (like the Trinity or the Divinity of Jesus) in official acts or proclamations. . . ."

One of the justices who agreed with Part V A of Justice Blackmun's opinion for the Court was Justice O'Connor, who also wrote a separate concurring opinion. In Part II of Justice O'Connor's concurring opinion, Justice O'Connor stated,

> "An Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization, post, 492 U.S. at 659-662, 109 S.Ct. at 3136-3137, 492 U.S. at 663-665, 109 S.Ct. at 3138-3139, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty with respect to religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis. . . To require a showing of coercion, even indirect coercion, as an essential element of Establishment Clause violation would make the Free Exercise Clause a redundancy...." 492 U.S. at 627-628, 109 S.Ct. at 3119.

Justice O'Connor also stated in her concurring opinion, 492 U.S. at 629, 109 S.Ct. at 3120:

> ". . . [I]t is notable that the three Courts of Appeals which have considered challenges to the display of a creche standing alone at city hall have each concluded, relying in part on endorsement analysis, that such a practice sends a message to nonadherents of Christianity that they are outsiders in the political community. . . ."

It is clear that the decision of the California Court of Appeal below correctly stated the law as announced by this Court in Marsh v. Chambers, and County of Allegheny v. ACLU, supra. Since the filing of this lawsuit in November of 1999 world events have proven the wisdom of Respondents' lawsuit. It is clear that one of the most destructive activities of the population of this planet is the combining of religion with government. More and more the wisdom of the framers of the Constitution has proven remarkable. Countries do not succeed where religion and government are mixed. The separation of religion from government is critical. This is especially true in a pluralistic society such as the United States of America. The recitation of a prayer in the name of Jesus Christ is simply impermissible under the Establishment Clause of the First Amendment. Jesus Christ is central to the Christian religion. The Gospel according to St. John (Chapter 3):

> " 3. Jesus . . . said unto him, verily, verily, I say unto thee, Except a man be born again, he cannot see the kingdom of God. . . .
> 15. That whosoever believeth in Him should not perish, but have eternal life.
> 16. For God so loved the world, he gave his only begotten Son, that whosoever believeth in

> Him should not perish, but have everlasting life.
> 17. For God sent not his Son into the world to condemn the world; but that the world through Him might be saved.
> 18. He that believeth on Him is not condemned: but he that believeth not is condemned already, because he hath not believed in the name of the only begotten Son of God. . . .
> 36. He that believeth on the Son has everlasting life: and that he that believeth not the Son shall not see life; but the wrath of God abideth on him."

Jesus Christ is the Son of God according to the Christian religion. This is the central attribute of Christianity. By definition Christians view Jesus Christ as the Lord and Savior. Jesus of Nazareth was born a Jew but the Jewish religion does not consider Jesus to be the Son of God. Jews do not view Jesus as being the Savior.

In Washegesic v. Bloomingdale Public School, 33 F.3d 679 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court that a portrait of Jesus Christ be removed from a school where it was on display. In upholding the removal of the photograph, the Sixth Circuit stated, 33 F.3d at 648:

> ". . . Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive. Though the portrait, like school prayers and other sectarian religious rituals and symbols, may seem 'de minimis' to the

> great majority, particularly those raised in the Christian faith and those who do not care about religion, a few see it as a governmental statement favoring one religious group and downplaying others. It is the rights of these few that the Establishment Clause protects in this case."

In summary, the decision of the Court of Appeal below is the correct statement of the law. If this Honorable Court believes that the decision below is inconsistent with Marsh v. Chambers then this Honorable Court should grant certiorari and overrule Marsh v. Chambers. Otherwise, this Court should deny certiorari.[1]

Respectfully submitted,

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Attorney for Respondents

[1] Respondents are, of course, cognizant of the current interest in religion by the Courts. For example, in Newdow v. United States Congress, 313 F.3d 495 (9th Cir. 2002), the Ninth Circuit in a split decision held that the words "under God" would have to come out of the Pledge of Allegiance with respect to school children. On February 28, 2003 en banc review was denied but the decision was stayed pending review by this Court.

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In The

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THE CITY OF BURBANK,

Petitioner,

v.

IRV RUBIN AND ROBERTO ALEJANDRO GANDARA,

Respondents.

On Petition For A Writ Of *Certiorari* To The California Court Of Appeal, Second Appellate District

BRIEF OF *AMICI CURIAE* 80 PUBLIC AGENCIES AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER THE CITY OF BURBANK'S PETITION FOR WRIT OF *CERTIORARI*

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INTEREST OF *AMICI CURIAE*

The *amici*[1] are 80 public agencies located throughout the nation who join together with the International Municipal Lawyers Association ("IMLA")[2] and ask this Court to grant the City of Burbank's petition for *certiorari*.

The *amici* are acutely interested in this case because unwarranted burdens have been imposed on political subdivisions desiring to maintain their legislative prayer practices. The standard articulated in *Rubin v. City of Burbank*, 101 Cal.App.4th 1194 (2002), restricts California legislative prayer practices by forcing censorship of the invocations despite any readily discernible constitutional infirmity. Nationally, governmental entities are concerned that continuing their practices without pre-screening invocations (and barring "sectarian" ones) will expose them to liability for purported Establishment Clause violations. They are equally concerned that conducting the

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[1] In accordance with Supreme Court Rule 37.6, the *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amici* and their counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief, and, in accordance with Supreme Court Rule 37.3, letters evidencing this consent are being filed concurrently with the Clerk. A list of the *amici* appears in the appendix to this brief.

[2] Since 1935, IMLA has been the primary advocate for the chief legal officers of local governments throughout the United States and Canada. Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them. IMLA serves its membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an *amicus curiae* on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

Rubin preview will violate some other state or federal constitutional prohibition. E.g., *Snyder v. Murray City Corp.*, ___ P.3d ___, 2003 WL 1860524 (Utah April 11, 2003) (city with practice allowing legislative prayers could not, after reviewing his proposed prayer, foreclose an atheist from participating because it violated Utah's constitutional neutrality requirement).[3]

Given the intrusive California standard and its confusing interlacement of Establishment Clause and Free Speech rights – especially when juxtaposed with this Court's (and others') neutrality standard (see *infra*) – *amici* fear that many public entities may opt against allowing the traditional legislative prayer. Their alarm is amplified by the unpredictable interpretation, and inconsistent application, of constitutional principles.

So, by abolishing their legislative prayer practices, governmental bodies would no longer need to guess how the multitude of lower state and federal courts would define the scope of "permissible" legislative prayer. But the Constitution does not compel that unmitigated retreat to a non-prayer position, and *amici* would prefer having the right to continue the historical and constitutionally-permissible practice of commencing legislative sessions with an opening prayer.

The *amici* have a profound desire for this Court to impart a uniform standard for legislative prayers, rather

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[3] The *Snyder* opinion is still subject to revision before its release for publication in the permanent law reports; nonetheless, it is referenced here to exemplify the real dilemma facing public entities that allow legislative prayers.

than leaving this important issue to the myriad of federal and state courts who interpret the Establishment Clause differently. This Court's decision on the merits of the instant action will guide all legislative bodies throughout the United States, and ensure that the historical practice may be continued within acceptable, clearly articulated, constitutional bounds.

SUMMARY OF ARGUMENT

The California Court of Appeal's interpretation of both the Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), and the Establishment Clause creates significant confusion and ultimately chills the willingness any public agency may have to maintain its legislative prayer practice. *Rubin* erects a substantial hurdle – likely unnecessary – by requiring a governmental body to examine individual prayers and eliminate "sectarian" content. The *Rubin* directive is amorphous, and its application plainly problematic. Besides identifying the specific reference to Jesus Christ as prohibited sectarian prayer, the *Rubin* court did not provide any insight into what other sectarian expressions would violate the Constitution.

Rubin does not stand alone in its Establishment Clause mystification. Other appellate jurists, often in stark disagreement with members of their court, have related their theories, but no common theme can be deduced from the mélange. This Court should eliminate the confusion and clearly delineate the constitutional borders for legislative prayers.

ARGUMENT

GRANTING *CERTIORARI* IS NECESSARY TO RESOLVE THE UNCERTAINTY ABOUT THE APPROPRIATE CONSTITUTIONAL STANDARDS FOR LEGLATIVE PRAYER, AND TO ABATE THE CHILLING EFFECT CREATED BY THE CALIFORNIA COURT'S MANDATE TO MICRO-MANAGE PROSPECTIVE PRAYERS.

Marsh confirmed the constitutionality of legislative prayers. Further, *Marsh* approved of their 16-year delivery by a clergyman from a single denomination, holding this practice did not advance "the belief of a particular church." 463 U.S. at 793. Now, under *Rubin*, a single prayer could subject the City of Burbank to a contempt citation for violating an injunction prohibiting "sectarian" prayer.[4]

In *Marsh*, the Court upheld the historical practice of commencing legislative sessions with Judeo-Christian prayers offered by a state-paid chaplain, concluding that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause arising from a practice of prayer

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[4] As Chief Justice Rehnquist recalled, "George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of 'public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.' Presidential Proclamation, 1 Messages and Papers of the Presidents, 1789-1897, p. 64 (J. Richardson ed. 1897)." *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, J., dissenting). Query whether President Washington's expression of thanks to "Almighty God" would pass muster under the California court's new standard – isn't this statement sectarian to all polytheists (e.g., Buddhists, Hindus, Shintoists, to name a few), and now, under California's criterion, constitutionally impermissible?

similar to that now challenged." 463 U.S. at 791. Significantly, the Court refused to parse the content of a *particular* prayer or undertake a sensitive evaluation to ascertain whether the prayer *opportunity* was being used to advance a particular religion.

> "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh*, *supra*, 463 U.S. at 794-795.

Despite quoting this exact passage (101 Cal.App.4th at 1201), the *Rubin* court demanded a probing of every proposed prayer to parse and ban sectarian invocations. *Id.* at 1204. Below, the City of Burbank contended that references to Jesus Christ in twenty percent of the volunteer's prayers did not advance a single faith. In formulating its rejection, the California court "interpret[ed] *Marsh* to mean that *any* legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause." *Id.* (emphasis in original).[5]

But is the standard for the recently-defined California legislative prayer practice truly mandated by the United

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[5] Albeit under an Establishment Clause challenge to a holiday display, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), suggests otherwise: "[n]or does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."

States Constitution? The Court's opinion in *Marsh*, which evinces a concern for allowing all religious groups the *opportunity* to provide legislative invocations, seems to suggest that the City of Burbank's practice is constitutional. Otherwise, universal participation in the legislative prayer process is eliminated; members of any religious group whose dogma compels them to proclaim their deity could not give a legislative prayer. Nonetheless, the California court chose inquisition over participation.[6]

In so doing, the state court below blended principles from *Marsh* with other Establishment Clause jurisprudence that have no application to legislative prayer (101 Cal.App.4th at 1202-1203, 1206-1207). Rather, this other line of authority is used to analyze, for example, the constitutionality of school prayer [*Santa Fe*, *supra*, 530 U.S. 290], and religious displays [*County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch*, *supra*, 465 U.S. 668]. While with the District of Columbia Court of Appeals, Justice Ginsburg aptly noted that "the existing legislative prayer practice, *Marsh* plainly indicates, fits into a special nook – a narrow space tightly sealed off from otherwise applicable first amendment doctrine." *Kurtz v. Baker*, 829 F.2d 1133, 1147 (D.C.

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[6] In *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993), the Utah Supreme Court concluded that Salt Lake City's policy – wherein the city explicitly stated that it would "not dictate the form or content of any" volunteer presentation (*id.* at 918) – satisfied the Utah Constitution. In contrast to *Rubin*, the *Whitehead* court determined the constitutional challengers could not succeed because the city had not favored any particular religions or religion in general, but rather "made efforts to assure that a broad cross-section of the community was represented" and no group or individual was denied a realistically equal opportunity to participate. *Id.* at 939.

Cir. 1987) (Ginsburg, J., dissenting), *cert. denied*, 486 U.S. 1059 (1988);[7] see also, *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) (describing the majority decision in *Marsh* as "carving out an exception to the Establishment Clause" to "accommodate legislative prayer"). *Rubin*, it appears, cluttered that nook.

Now, the City of Burbank and all California governmental bodies must "sensitively evaluate" and "parse the content" of prayers to ensure that they are not sectarian. However, other than making sure that Jesus Christ is not mentioned, the *Rubin* court offers no guidance for the legislative bodies to follow. How sensitive must the evaluation be? How much parsing of a prayer is necessary to satisfy the Establishment Clause? Is it enough for a governmental body to provide all religious groups the *opportunity* to open its legislative sessions with a prayer? Is it sufficient that the religious group leaders rotate, or that the leaders – without any input from the public entity – select the order of prayer presentation? These are but some of the many unanswered questions that this Court could address by granting the City of Burbank's petition.

The California appellate court is not the only source of confusion. Many other courts contribute, too, when they turn to *Marsh* for guidance even though they are not

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[7] *Kurtz* involved a "secular humanist" who challenged the refusal of U.S. Senate and House chaplains to invite a non-believer to the morning prayer sessions and allow him to deliver remarks that did not invoke any deity. Although the majority vacated the judgment and remanded the case with directions to dismiss for lack of subject matter jurisdiction, Justice Ginsburg dissented from the majority's standing disposition and would have affirmed the judgment as correct under *Marsh*.

addressing legislative prayer disputes. Their decisions reflect diverging interpretations of *Marsh* and disagreement about its application to various Establishment Clause issues.

The incertitude was recently highlighted in a single opinion. *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) (*en banc*), *cert. denied*, 526 U.S. 1039 (1999). *Snyder* arose after an individual was denied the opportunity to give a prayer because of its content, namely, a "prayer" beseeching the city officials to stop using religion in public affairs. The decision reflects three pools of thought.[8]

The *en banc* majority in *Snyder* rejected the proponent's claim that the denial resulted in the preference of one religion over another. It deemed his prayer to "aggressively advocate" his belief in the "sacrilegious nature of governmental prayer" which constituted impermissible proselytizing. 159 F.3d at 1235.

Snyder's concurring opinion found that the majority improperly extended *Marsh* to allow the government to censor and bar certain prayers. However, after determining that the city could not engage in liturgical supervision, the concurring judge ruled that the plaintiff could not seek the requested relief (i.e., the right to articulate a proselytizing legislative prayer), which itself would violate the Establishment Clause. *Id.* at 1236, 1242. *Cf.*, *Santa Fe*, *supra*, 530 U.S. at 305-306 (applying "content neutrality"

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[8] The waters have become even murkier. As noted above, the Utah Supreme Court just ruled that the Murray City policy violated Utah's Constitution. *Snyder v. Murray City Corp.*, ___ P.3d ___, 2003 WL 1860524 (Utah April 11, 2003).

requirement to school district policies); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394-396 (1993) (rejecting argument that allowing church to show religious film on school property – which otherwise was open to a wide array of activities – would violate the Establishment Clause, and holding that the Free Speech Clause requires governments to accommodate all religious viewpoints when religious speech is constitutionally-permissible).

The *Snyder* dissent found the city's content-based rejection of a particular prayer violated the Establishment Clause's neutrality guarantee. *Id.* at 1243, 1246. *Cf.*, *Santa Fe, supra*, 530 U.S. at 305-306 (holding school district's policy that permitted only "nonsectarian, non-proselytizing prayer" was unconstitutional, noting the single student (voted by a majority) provided season-long invocations, thereby precluding the minority candidates from expressing their views and sharing their diverse speech; *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000) ("The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views."); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality.").

The contrasting judicial approaches to prayer analysis are also reflected in the Sixth Circuit's published denial of a rehearing *en banc*. *Coles v. Cleveland Board of Education*, 183 F.3d 538 (6th Cir. 1999). Initially, the three-judge panel evaluated the constitutionality of the education board's practice of opening meetings with prayers (many of which mentioned Jesus by name). *Coles v. Cleveland Board of Education*, 171 F.3d 369, 384 (6th Cir. 1999). In a

divided opinion, the majority opted to apply *Lee v. Weisman*, 505 U.S. 577 (1992), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), rather than *Marsh*, to hold the prayer practice unconstitutional (171 F.3d at 380-386); the dissent, using *Marsh*, found no constitutional violation (*id.* at 389).[9]

Then, six judges dissented from the order denying rehearing *en banc*, led by Judge Boggs who specifically wrote to "call attention to the implication of the panel majority's determined drive to erase the possibility of any inclusion of a request for divine guidance in the solemnization of at least this species of public meeting." 183 F.3d at 542. Further, he stated, "What a crabbed view of the nature of humanity is implied by the notion that the Constitution would forbid one of the members to choose to express inspiration from the Torah, Koran or Book of Common Prayer!" *Id.*

Although current California law, including the injunction under which the City of Burbank is monitored, prohibits "sectarian" prayer, all prayer is by nature sectarian to a degree – each prayer, at least implicitly if not overtly,

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[9] Several years ago, a district court in California published its order denying a motion for preliminary injunction brought by teachers against a school board, which opened its meetings with a religious prayer. *Bacus v. Palo Verde Unified School Dist. Bd. of Educ.*, 11 F.Supp.2d 1192 (C.D. Cal. 1998). The district court applied the *Marsh* analysis and, of particular note, rejected the teachers' contention that the invocations in issue were overtly sectarian because they frequently referred to Jesus or Jesus Christ. *Id.* at 1197, quoting *Marsh*, *supra*, 463 U.S. at 794-795. But the Ninth Circuit Court of Appeals added to the confused state of the law on this issue by reversing the district court in an *unpublished* memorandum. *Bacus v. Palo Verde Unified School Dist. Bd. of Educ.*, 52 Fed.Appx. 355, 2002 U.S.App. LEXIS 24552 (9th Cir. 2002).

reflects the teachings of a particular denomination. Similarly, prayers can be sectarian simply by virtue of the manner in which they are offered by Buddhists, Taoists, Sikhs, Jains, Hindus, Muslims, or members of any of the numerous other religions – even if the name of a deity is not uttered.

Forty years ago, the Court recognized the existence of 83 religious bodies with membership greater than 50,000, and innumerable smaller groups. *Abington*, *supra*, 374 U.S. at 214. Unquestionably, the number of religious groups and sects in this country has grown over the last four decades. In an interview, which ran in the June 22, 2001 edition of *Religion & Ethics Newsweekly*, Harvard Professor of Comparative Religion and Indian Studies, Diana Eck, indicated that the United States has "become the most religiously diverse nation on earth." http://www.pbs.org/wnet/religionandethics/week443/profile.html. Professor Eck noted the fact that American Christians "are pretty abysmally ignorant about the religious traditions of the rest of the world." *Id.* To better comprehend one religion, Buddhism, she suggested "that Christians [] get out there and understand what it means for a vibrant, religious tradition that has transformed the whole of Asia and now is beginning to transform America – what it means for a vibrant religious tradition not to use the symbol 'God' in the way we do." *Id.*

Yet, the *Rubin* standard stymies such an effort. If governmental agencies ended their legislative prayer practices, then groups like the nondenominational Burbank Ministerial Association will lose a prime opportunity

for unifying community fellowship, which enables members of the association, as well as the public at large, to share their respective religions.[10]

Another important reason to grant *certiorari* here stems from the *Rubin* court's failure to adequately explain how its ruling – which requires the city to interject itself into the prayer process and censor certain prayers – is viable under the Establishment Clause's prohibition against government entanglement in religion. Equally problematic is the California court's nonobservance of the Establishment Clause's neutrality requirement; *sub silentio*, the *Rubin* decision forces California entities to discriminate against religious groups that invoke their deities by not allowing them to participate in the legislative prayer process. This disparagement sparks its own Establishment Clause imbroglio.

Additionally, if the *Rubin* decision is allowed to stand, legitimate Free Speech considerations must be addressed. The California opinion mandates censorship of certain religious speech, *viz.*, the prayers of those compelled to pray in the name of their deity. The California appellate court was satisfied that its content-based censorship was

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[10] Although the Burbank Ministerial Association may not have the largest cross-section of religions within its current membership, a city like Flushing, Queens, New York does. See Profile of Diana Eck, comment of scholar R. Scott Hanson, http://www.pbs.org/wnet/religionandethics/week443/pluralism.html (noting that in June 2001, a few square miles in Flushing had Hindu and Buddhist temples, Sikh Gurdwaras, Muslim mosques, Reform, Conservative and Orthodox Jewish synagogues, Catholic churches (which conducted services in English, Spanish and Chinese), and Protestant churches of "every denomination abound, including over 100 Korean (mainly Presbyterian) churches alone.").

mandated by the Establishment Clause and that its ruling survived the First Amendment's Free Speech protections. *Amici* are not as convinced. See *Santa Fe*, *supra*, 530 U.S. at 302 ("there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech, which the Free Speech and Free Exercise Clauses protect.") (emphasis in original). This Court should provide necessary guidance on this point, too.

CONCLUSION

The potential chilling effect of the California Court of Appeal's decision, and the evident confusion in the law addressing this important Establishment Clause issue, has prompted a number of public entities and IMLA to join the City of Burbank in urging this Court to enunciate the appropriate constitutional standards governing legislative prayers. Accordingly, *amici* support the granting of a writ of *certiorari* in this matter.

Respectfully submitted,

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PARTICIPATING AMICI CURIAE

Organizations

International Municipal Lawyers Association

U.S. Cities

City of Anaheim	California
City of Atascadero	California
City of Avalon	California
City of Barstow	California
City of Big Bear Lake	California
City of Brentwood	California
City of Calipatria	California
City of Carlsbad	California
City of Carson	California
City of Cathedral City	California
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Leon County	Florida

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City of Middleton	Idaho
Village of Bolingbrook	Illinois
Village of South Holland	Illinois
City of Methuen	Massachusetts
City of Lansing	Michigan
City of Independence	Missouri
City of Wilson	North Carolina
City of Bethany	Oklahoma
City of Piedmont	Oklahoma
City of Knoxville	Tennessee
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